Message

From: Johnson Koch, LeAnn M. (Perkins Coie) [LeAnnJohnson@perkinscoie.com]

Sent: 9/18/2017 5:50:21 PM

To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Traylor, Patrick

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=b6d06c6b766c4b4b8bfdf6b0fea4b998-Traylor, Pa]

CC: Dominguez, Alexander [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=5ced433b4ef54171864ed98a36cb7a5f-Dominguez,]

Subject: PESRM RFS - Confidential

Attachments: PESRM Options Paper.docx; Final RFS1 Rule Excerpt - General Hardship.pdf

Mandy and Patrick -

Attached is a one-pager laying out three tools that EPA has available to relieve PESRM of its 2016/2017 RFS obligations. Based on the feedback we've received from EPA about the use of the waiver authority, we think an interim or direct final rule or combination of enforcement and interim or direct final rule, is the best option. We think an interim or direct final rule relying on the 2007 final rule to include "general" hardship provisions will be the fastest and the fact that EPA proposed to include general hardship provisions in an earlier rulemaking would support using an interim/direct final rule to establish one now, rather than initiating a multi-year rulemaking process. For your convenience, I've attached a one-page excerpt from the 2007 rule. General hardship provisions were not included at the time based on the belief that RINs would be cheap and available.

I would be interested in talking with you about this approach once you've had an opportunity to consider it.

Thanks, LeAnn

LeAnn Johnson Koch | Perkins Coie LLP

202.654.6209 (office) 202.253.8152 (mobile)

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FEDERAL REGISTER

Vol. 72 Tuesday,

No. 83 May 1, 2007

Part II

Environmental Protection Agency

40 CFR Part 80

Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program; Final Rule

specified in the regulations at § 80.1142), except the letter will not be due prior to the program. Small refiner status verification letters for this rule that are later found to contain false or inaccurate information will be void as of the effective date of these regulations. Unlike the case for small refineries, small refiners who subsequently do not meet all of the criteria for small refiner status (i.e., cease producing gasoline by processing crude oil, employ more than 1,500 people or exceed the 155,000 bpcd crude oil capacity limit) as a result of a merger with or acquisition of or by another entity are disqualified as small refiners, except in the case of a merger between two previously approved small refiners. As in other EPA programs, where such disqualification occurs, the refiner must notify EPA in writing no later than 20 days following the disqualifying event.

The Act provides that the Secretary of Energy must conduct a study for EPA to determine whether compliance with the renewable fuels requirement would impose a disproportionate economic hardship on small refineries. If the study finds that compliance with the renewable fuels requirements would impose a disproportionate economic hardship on a particular small refinery, EPA is required to extend the small refinery's exemption for a period of not less than two additional years (i.e., to 2013). The Act also provides that a refiner with a small refinery may at any time petition EPA for an extension of the exemption for the reason of disproportionate economic hardship. In accordance with these provisions of the Act, we are finalizing the provision that refiners with small refineries may petition EPA for an extension of the small refinery exemption. As provided in the Act, EPA will act on the petition not later than 90 days after the date of receipt of the petition. Today's regulations do not provide a comparable opportunity for an extension of the small refinery exemption for small refiners. Therefore, all parties temporarily exempted from the RFS program on the basis of qualifying as a small refiner, rather than a small refinery, must comply with the program beginning January 1, 2011 (unless they waive their exemption prior to this

During the initial exemption period for small refineries and small refiners and any extended exemption periods for small refineries, the gasoline produced by exempted small refineries and refineries owned by approved small refiners will not be subject to the renewable fuel standard.

We proposed that the automatic exemption to 2011 and any small refinery extended exemptions may be waived upon notification to EPA; and we are finalizing this provision. Gasoline produced at a refinery which waives its exemption will be included in the RFS program and will be included in the gasoline used to determine the refiner's renewable fuel obligation. If a refiner waives the exemption for its small refinery or its exemption as a small refiner, the refiner will be able to separate and transfer RINs like any other obligated party. If a refiner does not waive the exemption, the refiner could still separate and transfer RINs, but only for the renewable fuel that the refiner itself blends into gasoline (i.e. the refinery operates as an oxygenate blender facility). Thus, exempt small refineries and small refiners who blend ethanol can separate RINs from batches without opting in to the program in the same manner that an oxygenate blender is allowed to do.

b. General Hardship Exemption

In recent rulemakings, we have included a general hardship exemption for parties that are able to demonstrate severe economic hardship in complying with the standard. We proposed not to include provisions for a general hardship exemption in the RFS program. Unlike most other fuels programs, the RFS program includes inherent flexibility since compliance with the renewable fuels standard is based on a nationwide trading program, without any per gallon requirements. and without any requirement that the refiner or importer produce the renewable fuel. By purchasing RINs, obligated parties will be able to fulfill their renewable fuel obligation without having to make capital investments that may otherwise be necessary in order to blend renewable fuels into gasoline. We believe that sufficient RINs will be available and at reasonable prices, given that EIA projects that far greater renewable fuels will be used than required. Given the flexibility provided in the RIN trading program, including the provisions for deficit carry-over, and the fact that the standard is proportional to the volume of gasoline actually produced or imported, we continue to believe a general hardship exemption is not warranted. As a result, the final rule does not contain provisions for a general hardship exemption.

c. Temporary Hardship Exemption Based on Unforeseen Circumstances

In recent rulemakings, we have included a temporary hardship exemption based on unforeseen

circumstances. We proposed not to include such an exemption in the RFS program. The need for such an exemption would primarily be based on the inability to comply with the renewable fuels standard due to a natural disaster, such as a hurricane. However, in the event of a natural disaster, we believe it is likely that the volume of gasoline produced by an obligated party would also drop, which would result in a reduction in the renewable fuel requirement. We, therefore, reasoned in the NPRM that unforeseen circumstances, such as a hurricane or other natural disaster. would not result in a party's inability to obtain sufficient RINs to comply with the applicable renewable fuels standard.

We received several comments regarding the inclusion of a temporary hardship exemption based on unforeseen circumstances. One commenter believes it would be of value to have a mechanism for selectively waiving or modifying the RFS downward on a temporary basis in the event of unforeseen circumstances such as significant drought affecting potential crop production. The commenter believes that crop shortages could have an impact on a national level, or a major disaster may impact logistics of renewable fuel distribution regionally, necessitating a more rapid response from EPA than is provided in the Energy Act. Another commenter believes that a temporary hardship exemption based on unforeseen circumstances should be included in the rule since it is impossible to predict how the RFS program will impact small refiners. Another commenter believes that, given the variety of potentially challenging unforeseen events during the last several years, it is not inconceivable that man-made or natural circumstances could adversely impact the RFS program. A natural disaster in the agricultural section, for example, may make it difficult to meet the renewable fuels mandate which, in turn, could drive the price of RINs high enough to disrupt the gasoline market. The commenter believes that a mechanism built into the program from the outset would provide a more flexible and less disruptive way to address unforeseen circumstances than the more timeconsuming waiver process provided in the Energy Act.

Under other EPA fuels programs, compliance is based on a demonstration that the fuel meets certain component or emissions standards. Unforeseen circumstances, such as a natural disaster, may affect an individual refiner's or importer's ability to produce or import fuel that complies with the

Message

From: Johnson Koch, LeAnn M. (Perkins Coie) [LeAnnJohnson@perkinscoie.com]

Sent: 8/1/2017 6:57:05 PM

To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Dominguez, Alexander

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=5ced433b4ef54171864ed98a36cb7a5f-Dominguez,]

CC: GATTA, GREGORY G [GREGORY.GATTA@pes-companies.com]; John B. McShane (john.mcshane@pes-

companies.com) [john.mcshane@pes-companies.com]; Thompson, Ryan (thompsonr@akingump.com)

[thompsonr@akingump.com]

Subject: PESRM RFS Waiver Petition -- Confidential Business Information

Attachments: Exhibit A - Refinery_Inventory_Northeast.pdf; 2017.08.01 PES Waiver Petition.docx

Hi Mandy and Alex -

In advance of our meeting tomorrow, attached is a draft of the waiver petition Philadelphia Energy Solutions Refining and Marketing LLC is preparing for submission. It includes all but the severe economic harm section, which we are putting the finishing touches on. The petition lays out the company's legal analysis supporting the agency's use of its waiver authority to relieve PESRM of its 2017 RFS volume obligations and contains background information describing the urgent need for relief and the consequences of not securing it. We will complete the petition shortly, but wanted to give you as much information as possible before the meeting tomorrow.

Please let me know if you have any questions. We look forward to meeting with you tomorrow at 3:30.

Thanks, LeAnn

LeAnn Johnson Koch | Perkins Coie LLP

202.654.6209 (office) 202.253.8152 (mobile)

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Operating Refineries Located in PADD 18 (Central Atlantic) as of January 1st

				Total Crude Distillation Espacity barrels per calendar-day		Operating Crude Distillation Copacity barrels per calendar day		Announced Potential	Last Operations	
Company Name in 2009	Company Name in 2017	Refinery	Location	2009	20.17	2009	2017	Closure	or tale	Closed
American Refining Group	American Refining Group	Bradford	Bradford, PA	10,000	11,000	10,000	11,000			
Canaca Phillips	Phillips 66	Bayway	Linden, NJ	238,000	241,000	238,000	241,000			
Conoco Phillips	Monroe Energy	Trainer	Trainer, PA	185,000	190,000	185,000	1.90,000	Sep-2011	Apr-2012	
Premcor Refining Group Inc (Valero)	Delaware City Refining Co (PBF)	Delaware City	Delaware City, DE	182,200	182,200	182,200	182,200	Nov-2009	Apr-2010	
Sunoco Inc	(Closed)	Eagle Point	Westville, NJ	145,000		145,000		Oct-2009	Nov-2009	Feb-2010
Sunoco inc	Philadelphia Energy Solutions	Point Breeze, Girard Point	Philadelphia, PA	335,000	310,000	335,000	310,000	Sep-2011	Jul-2012	
United Refining Co	United Refining Co	Warren	Warren, PA	65,000	65,000	65,000	65,000			
Valero New Jersey	Paulsboro Refining (PBF)	Paulsboro	Paulsboro, NJ	160,000	160,000	160,000	160,000	Oct-2009	Sep-2010	
Sunoco Inc	(Closed)	Marcus Hook	Marcus Hook, PA	178,000		1.78,000		Dec-2011	Dec-2011	Dec-2011
Totals			9	1,498,200	1,159,200	1,498,200	1,159,200			
			Announced Closures nounced Closures % of Total Closures nounced Closures % of Total PESRM % of Total	1,185,200 79.1% 323,000 21.6% 22.4%	26.7%	1,185,200 79.1% 323,000 21.6% 22.4%	26.7%			
EIA Checksum	Exclude Asphalt refining>			1,498,200	1,159,200	149,820	1,159,200			
EIA Checksum NUSTAR Asphalt Refining Co	Exclude Asphalt refining> Axeon Specialty Products		Paulsboro, NJ	1,498,200 32,000	1,159,200 74,400	149,820 32,000	1,159,200		Sep-2012	Dec-2014
		Perth Amboy	Paulsboro, NJ Perth Amboy, NJ			,			Sep-2012 Mar-2008	Dec-2014 Jul-2012
NUSTAR Asphalt Refining Co	Axeon Specialty Products	Perth Amboy Newell		32,000	74,400	32,000	0			
NUSTAR Asphalt Refining Co Chevron USA Inc (Asphalt)	Axeon Specialty Products Buckeye Partners		Perth Amboy, NJ	32,000 0	74,400 0	32,000 80,000	0	Aug-2010		
NUSTAR Asphalt Refining Co Chevron USA Inc (Asphalt) Ergon West Virginia Inc	Axeon Specialty Products Buckeye Partners Ergon West Virginia Inc	Newell	Perth Amboy, NJ Newell, WV	32,000 0 20,000	74,400 0 22,300	32,000 80,000 20,000	0 0 22,300	Aug-2010 Jun-2009	Mar-2008	Jul-2012

Source

ConocoPhillips Press Release, "ConocoPhillips Seeks Buyer for Trainer, https://www.touts.com/se/def-relinery_sele-valen-intits Sunoco Press Release, 9/6/11, "Sunoco to Exit Refining and Conduct St. Sunoco Press Release, 9/6/11, "Sunoco to Exit Refining and Conduct St. Sunoco Press Release, 9/6/11, "Sunoco to Exit Refining and Conduct St.

http://www.nttp://www.nt.com/pusiness/index.sti/2019/09/valero_er Sunoco Press Release, "Sunoco to Idle Main Processing Units at Marcu

http://www.nc.com/business/index.sst/2012/08/pards_amboy_rafina

http://www.tientienecex.com/articles/psensors.ev/2010/08/westerre. http://www.tientienecex.com/articles/psensors.ev/2010/08/westerre. $Pa., Refinery, "9/27/11, http://www.conocophillips.com/EN/newsroom/news_releases/2011news/Pages/09-27-2011.aspx. The property of the propert$

rategic Neview of the Company," http://phx.corporateir.net/phoenix.zhtml?c=99437&p=irol-newsArticle&iD=1603618&highlight 202. Deal reported to keep Janoco s. Poiladeiphia refinery operating.htm

exizy_to_set_pastspor.htm s Hook Refinery," 12/1/11, http://phx.corporateir.net/phoenix.ahtml?c=99437&p=irol-newsArticle&iD=1635429&highlight=

by to get ne-him

refining idling intro

Message

From: Kennedy, Brian (Flake) [Brian_Kennedy@flake.senate.gov]

Sent: 6/29/2017 3:12:31 PM

To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Palich, Christian

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=330ad62e158d43af93fcbbece930d21a-Palich, Chr]

CC: Fragoso, Michael (Judiciary-Rep) [Michael Fragoso@judiciary-rep.senate.gov]

Subject: RE: Early Implementation of Contingency Measures Language

Does that mean we can say epa supports?

From: Gunasekara, Mandy [mailto:Gunasekara.Mandy@epa.gov]

Sent: Wednesday, June 28, 2017 10:19 PM

To: Kennedy, Brian (Flake) < Brian Kennedy@flake.senate.gov >; Palich, Christian < palich.christian@epa.gov >

Cc: Fragoso, Michael (Judiciary-Rep) < Michael_Fragoso@judiciary-rep.senate.gov>

Subject: RE: Early Implementation of Contingency Measures Language

I think this is good. Appreciate the effort!

From: Kennedy, Brian (Flake) [mailto:Brian Kennedy@flake.senate.gov]

Sent: Wednesday, June 28, 2017 11:13 AM

To: Palich, Christian < palich.christian@epa.gov>; Gunasekara, Mandy < Gunasekara.Mandy@epa.gov>

Cc: Fragoso, Michael (Judiciary-Rep) < Michael Fragoso@judiciary-rep.senate.gov>

Subject: Early Implementation of Contingency Measures Language

Importance: High

Christian and Mandy,

We are interested in getting EPA's opinion on language related to a clarifying bill about early implementation. I have attached the language and a small summary.

As you may know, for over 20 years, EPA has allowed state and local governments to implement contingency measures early, that is, before such measures are required or "triggered" as a matter of law. Under long-standing policy implemented by the Clinton, Bush and Obama Administrations, EPA has considered it "illogical to penalize nonattainment areas that are taking extra steps to ensure attainment of the NAAQS by having them adopt additional contingency measures now." Early Implementation of Contingency Measures for Ozone and Carbon Monoxide (CO) Nonattainment Areas, U.S. EPA, Aug. 13, 1993.

A 2016 decision by the 9th Circuit, however, has thrown this long-standing policy into question. In Bahr v. EPA, No. 14-72327 (9th Cir. 2016), a 2-to-1 majority opinion held that CAA §172(c)(9) prevented EPA from approving contingency measures in a SIP if these measures were undertaken prior to an area failing to make reasonable further progress or reach attainment of a NAAOS.

We wanted to work with you on a potential legislative solution to this issue.

Do you guys have any suggestions?

Brian

Message

From: Lynn L. Bergeson [lbergeson@lawbc.com]

Sent: 6/23/2017 3:29:18 PM

To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Traylor, Patrick

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=b6d06c6b766c4b4b8bfdf6b0fea4b998-Traylor, Pa]; Beck, Nancy

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=168ecb5184ac44de95a913297f353745-Beck, Nancy]

Subject: RE: Connect on Timely Enforcement Issue

Mandy,

Thank you for your time. We appreciate how busy everyone is at EPA.

I am happy to stop over Monday, Wednesday afternoon, or Thursday so spend a few minutes with Nancy and Patrick to explain the situation.

LYNN L. BERGESON
MANAGING PARTNER
BERGESON & CAMPBELL PC

2200 Pennsylvania Avenue, N.W. Suite 100W | Washington, D.C. 20037 T: 202-557-3801 | F: 202-557-3836 | M: 202-257-2872 | lawbc.com

From: Gunasekara, Mandy [mailto:Gunasekara.Mandy@epa.gov]

Sent: Friday, June 23, 2017 11:07 AM **To:** Traylor, Patrick; Beck, Nancy

Cc: Lynn L. Bergeson

Subject: Connect on Timely Enforcement Issue

Patrick and Nancy,

I'm connecting you with Lynn Bergeson (cc'd) who I know from my work at NACD. She has an issue involving inconsistent approach to an enforcement matter across Region 2 and Region 5. After a brief conversation this morning, I believe it would be best for her to sit down with you both to figure out next steps. Please let me know if I can help.

Best, Mandy From: Tim Lust [tim@sorghumgrowers.com]

Sent: 6/20/2017 7:58:51 PM

To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]

CC: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; Dominguez, Alexander

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=5ced433b4ef54171864ed98a36cb7a5f-Dominguez,]

Subject: Re: Sorghum Oil Update

Mandy and Alex, We look forward to the meeting please let us know what schedules allow for next week. Regards, Tim



Tim Lust

Chief Executive Director (806) 749-3478 office (806) 438-3127 cell sorghumgrowers.com

Sorghum: The Smart Choice.



On Mon, Jun 19, 2017 at 8:18 PM, Gunasekara, Mandy < Gunasekara. Mandy@epa.gov > wrote:

HI Tim,

Justin forwarded me your message. I handle the Administrator's air portfolio and given the sorghum oil issue is under review at the Office of air and radiation (ie OTAQ) it would be good for us to meet. I've cc'd Alex Dominguez who can help set the meeting up.

Best,

Mandy

Begin forwarded message:

From: Tim Lust < tim@sorghumgrowers.com > Date: June 19, 2017 at 6:35:28 PM EDT

To: "Schwab, Justin" < schwab.justin@epa.gov >

Subject: Sorghum Oil Update

Justin,

I wanted to check with you and see if you had any information on sorghum oil? We have a tentative call with OTAQ staff this Friday at 1:00 pm eastern on sorghum oil but I don't have a good feel on what information will be discussed. I will be in DC next Tuesday-Friday, do you have any time for us to catch up at any time early or late next week? Regards, Tim



Tim Lust

Chief Executive Director

(806) 749-3478 office (806) 438-3127 cell

sorghumgrowers.com

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Message

From: Dave Tenny [dtenny@nafoalliance.org]

Sent: 6/16/2017 1:54:25 PM

To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]

CC: Chip Murray [cmurray@nafoalliance.org]

Subject: RE: Introductions

Hi, Mandy – it is great to see this connection. Bill will be very helpful to you – he is a great resource, has a very strong relationship with the Forest Service, and has over the years always been willing to devote time and effort into helping EPA with critical research and information.

We plan to be in touch with you soon as well. Looking forward to it.

Dave

From: Gunasekara, Mandy [mailto:Gunasekara.Mandy@epa.gov]

Sent: Friday, June 16, 2017 8:38 AM

To: Johansson, Robert - OCE; Bill Hohenstein (whohenstein@oce.usda.gov); Dominguez, Alexander

Cc: Chip Murray; Dave Tenny **Subject:** RE: Introductions

Chip, Thank you for the introduction.

Rob an Bill, it's very nice to e-meet you. I'd like to find a time to meet with you both to talk about these issues and what all we can work on together. I've cc'd Alex Dominguez who can help set up the logistics. I'm happy to host you both here at EPA or travel to USDA. Please let me know what you prefer. From my end, later next week (Thursday or Friday) could work or the week of June 26 (Monday, Tuesday or Wednesday).

Best, Mandy

From: Dave Tenny [mailto:dtenny@nafoalliance.org]

Sent: Wednesday, May 24, 2017 2:01 PM

To: Gunasekara, Mandy <<u>Gunasekara.Mandy@epa.gov</u>>; Johansson, Robert - OCE <<u>RJohansson@oce.usda.gov</u>>; Bill

Hohenstein (whohenstein@oce.usda.gov) < whohenstein@oce.usda.gov>

Cc: Chip Murray < cmurray@nafoalliance.org>

Subject: Introductions

Hi, Mandy – meet Rob Johansson and Bill Hohenstein from USDA. Rob is USDA's Chief Economist, and Bill is the Director of the Office of Environmental Markets within the OCE.

Rob and Bill work regularly with the Forest Service to provide expert information on the forest carbon cycle, biomass energy, the relationship between markets and forest dynamics, and a whole host of other topics relevant to your work. They will be a great resource to you and your colleagues.

We look forward to working with all of you going forward.

Warm regards,

Dave

David P. Tenny President and CEO National Alliance of Forest Owners 122 C Street, NW, Suite 630 Washington, D.C. 20001 Office: (202) 747-0739

Fax: (202) 824-0770 Cell: (703) 964-7519 dtenny@nafoalliance.org www.nafoalliance.org

Message

From: Jennifer Gibson [JGibson@NACD.com]

Sent: 6/1/2017 4:16:24 PM

To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Beck, Nancy

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=168ecb5184ac44de95a913297f353745-Beck, Nancy]

CC: Eric Byer [ebyer@NACD.com]

Subject: NACD Follow Up to Meeting with Administrator Pruitt - Enforcement Recommendations and Examples

Attachments: 2017-6-1NACD_EnfRecsWithExamples.pdf

Dear Mandy and Nancy,

Thanks again to Administrator Pruitt and both of you for meeting with the NACD Board of Directors on May 15. In response to the Administrator's request for more information, attached is a letter from Eric with NACD's recommendations on inspection and enforcement timelines and approaches. Appendix A of the letter includes several examples of enforcement delays and abuses NACD members have experienced in recent years. Please share this document with Administrator Pruitt.

We look forward to answering any questions you and the Administrator have and to continuing our discussions on these important issues.

Thank you for all of the hard work you and Administrator Pruitt are doing to create a rational regulatory environment for the business community!

Best regards,

Jennifer

Jennifer C. Gibson Vice President, Regulatory Affairs

National Association of Chemical Distributors (NACD)



1560 Wilson Blvd., Suite 1100 Arlington, VA 22209 (703) 527-6223 x3047 - Main Line (703) 527-7747 - Fax (571) 482-3047 - Direct jgibson@nacd.com

Linked 🗓



June 1, 2017

The Honorable Scott Pruitt Administrator U.S. Environmental Protection Agency Mail Code 1101A 1200 Pennsylvania Avenue, N.W. Washington, D.C. 20460

Dear Administrator Pruitt:

Thank you for meeting with the National Association of Chemical Distributors¹ (NACD) Board of Directors on May 15 and for your willingness to address the U.S. Environmental Protection Agency's (EPA) enforcement practices that result in needless uncertainty for businesses.

The majority of NACD members are small businesses that typically do not have the resources and legal expertise to battle EPA and other agencies when charges are levied against them. Because of this, they are pressured into settling and paying the fines, justified or not. To make matters worse, EPA has consistently failed to follow up on inspections and resolve cases in a timely manner, thereby hindering the ability of companies to focus on developing and growing their businesses.

As a follow up to our meeting, we are pleased to present the recommendations below. Also included in Appendix A to this letter are some examples of enforcement abuse cases NACD members have experienced.

Clear Time Limits Between Inspection and Next Steps/Clear Resolution of Cases

NACD strongly urges EPA to adopt limits between the time of an inspection and the time when the agency presents a company with a notice of violation (NOV). There have been far too many cases in which EPA conducts an inspection and raises some issues but then the company does not hear anything until one, two, or even three years later when they are presented with a NOV and proposed six-figure penalties. If a violation is so severe that it deserves a six-figure penalty, it does not make sense for EPA to keep that company in limbo for up to three years. NACD urges EPA to adopt a policy in which inspectors are straightforward with facilities and provide them with a clear description of the next steps and the timeframe for additional action.

For minor paperwork issues such as failure to report on a substance or misreporting an amount, it should be EPA's policy to notify the company of the violation <u>no later than 60</u> <u>days following the inspection</u>. For more complex issues such as failure to implement a Risk Management Plan properly, it should be EPA's policy to notify the company of the violation <u>no later than 120 days following the inspection</u>.

¹ NACD's nearly 440 member companies are vital to the chemical supply chain, providing products to over 750,000 end users. NACD members are leaders in health, safety, security, and environmental performance through implementation of NACD Responsible Distribution®, established in 1991 as a condition of membership and a third-party-verified management practice. For more information, visit www.NACD.com.

Further, these notifications must include *all* items of concern identified by EPA. NACD members have reported that, in many cases during negotiations with EPA, the agency has raised additional issues that were not included in the original notices.

If EPA fails to follow these timelines, the case should be considered closed and EPA prohibited from taking additional action against that company on the matter.

Once EPA has issued a violation notice and the company has responded, EPA should be held to the same timelines for response as the company. For example, if a company has 15 days to respond to an EPA order, the agency should have 15 days to follow up on that response. If EPA fails to follow the prescribed timeline, proposed penalties should be reduced, for example, 10 percent for each day over the required response date. EPA should be required to follow these prescribed timelines through final settlement of the case.

In addition, following an inspection in which EPA finds no violations, the agency should notify the company it is in good standing <u>no later than 60 days following the date of the inspection</u>.

Compliance Assistance and Grace Periods Over "Find and Fine"

Environmental protection would be enhanced if EPA would take a collaborative, compliance assistance-oriented approach rather than the too-common "find and fine" approach. EPA should work with facilities to ensure they are aware of their regulatory obligations before issuing penalties. In many cases, facilities, particularly small businesses, may be out of compliance not out of malice, but because they are simply unaware of the requirements or do not understand them. In small companies, the individual charged with regulatory compliance typically has other duties in addition to keeping current of all the federal, state, and local regulations to which the business is subject. Rather than issuing penalties without question, EPA should provide a period of time to comply.

For example, if an issue is easily correctable, such as a minor paperwork oversight, EPA should give the company no more than 30 days to submit the proper/correct information. If it is a more complex issue such as failure to develop a Risk Management Plan, EPA should give the company 180 days to submit the plan. If the company fails to comply within these timeframes, it is justifiable for EPA to issue penalties.

Again, written closure that the issue has been resolved is critical.

Adoption of these recommendations would significantly increase regulatory certainty for NACD members and the business community at large.

Thank you for the opportunity to present these recommendations. If you have questions or need additional information, please do not hesitate to contact me.

Sincerely,

Eric R. Byer President

NACD Member Examples of U.S. Environmental Protection Agency Enforcement Abuse

<u>Title V Air Permitting, New Source Performance Standards, Hazardous Substance Release</u>
<u>Reporting – Still Pending</u>
<u>EPA Region 5</u>

Charges Made Against Chemical Company in March 2008 That Remain Unresolved as of May 2017

In October 1981, a chemical company acquired from another chemical company a sulfuric acid production facility in Chicago, which the company then successfully operated for many years without any regulatory challenge by either state or federal environmental authorities.

Then, in March 2008, the U. S. Environmental Protection Agency's (EPA) Region 5 Office in Chicago, Illinois, sent Notices to the company claiming the Chicago facility that the company had operated since 1981 violated various EPA laws and regulations, including: (1) failure to obtain a federal Title V Air Permit; (2) failure to comply with federal New Source Performance Standards (NSPS); and (3) failure to report the release of a reportable quantity of a hazardous substance on December 31, 2007.

The company requested a meeting at the Region 5 Office, which took place April 15, 2008, to discuss these charges. At the meeting, one of the participating EPA representatives elaborated on the third charge, claiming the alleged December 31, 2007, hazardous release from the company's Chicago facility had caused "evacuations" of the company's neighbors. The company responded that neither the release nor the evacuations ever happened.

The day after the April 15, 2008, meeting at the Region 5 Office, an EPA attorney who had been present at the meeting called the company's General Counsel. During that conversation, the EPA attorney stated that he was surprised to hear his colleague accuse the company at the meeting of causing "evacuations" of the facility's neighbors because the EPA attorney had never before heard that accusation. After the meeting, he pressed his colleague on the issue, and, according to the EPA attorney, the EPA representative who made that accusation confessed he had made it up. The EPA attorney apologized for his colleague's false charge.

In June 2008, the company filed numerous responses to the EPA's charges, informing the EPA that, for the following reasons, the charges simply lacked merit:

- 1. The company is not required to obtain a Title V Air Permit because it has obtained instead a proper Federally Enforceable State Operating Permit (FESOP) that has remained continuously in good standing since its initial issuance to the company in 1981:
- 2. The company is not required to comply with the NSPS standards because the facility was built before those standards were enacted and, by their own terms, they do not apply to the facility;

- 3. Even if the NSPS standards were applicable to the company's Chicago facility, the company meets or exceeds all the material operating standards; and
- 4. Based upon the sworn statements of all the company's employees who were working on-site at the Chicago facility on December 31, 2007, the alleged December 31, 2007, release of hazardous material never occurred.

EPA Region 5 never replied to the company after receiving the company's June 2008 responses, nor has the EPA otherwise taken further action to resolve any of these alleged violations.

All these charges remain "open."

<u>Toxic Substances Control Act 2012 Chemical Data Reporting</u> – *Still Pending* EPA Region 10

- 1. A small company in Region 10 submitted its 2012 Chemical Data Report (CDR) to EPA June 5, 2012.
- 2. On May 16, 2013, Daryl D. Hudson and Dan-Tam Nguyen from ERG, an auditing firm for EPA, arrived to do a spot audit of the company's CDR submission.
- 3. Emails were exchanged and data requested by the auditors through the end of 2013.
- 4. Re-submission of data with corrections to the original report of June 5, 2012 were entered into EPA December 27, 2013.
- 5. Subpoena and Order to Show Cause Letter were received from EPA in the company's office June 13, 2016.
- 6. Subpoena and Order to Show Cause Letter addressed **ONLY TWO** violations/issues.
- 7. A conference call was held July 26, 2016, with Deniz Ergener and Tony Ellis of EPA. EPA confirmed they received the company's reply to the subpoena and they were satisfied with the reply and closed the subpoena.
- 8. During the conference call of July 26, 2016, **FIVE** issues/violations were discussed instead of two. This was the first the company learned there were three more violations than those outlined in the Order to Show Cause. They showed the company had two failed to report and three mis-reported quantities. Initial fines were discussed: Fail to report, \$24,080 per product; Mis-reporting, \$18,420 per product.
- 9. The company submitted evidence to show corrections, responses etc.

- 10. A conference call was held September 1, 2016, again with Deniz Ergener and Tony Ellis of EPA. Tony Ellis announced on this call that they were only fining the company for one Fail to report equaling \$24,080.00 and one Mis-Report equaling \$18,420 a total fine of \$36,125.
- 11. Since that time, the company has engaged in discussions to negotiate fines down based on company financial performance etc. They have submitted tax returns for the past three to four years to demonstrate rationale for lowering the fines. The company was advised last year EPA would be lowering the fines, and the company has been very cooperative etc. The company submitted additional financial information in January. They have not heard from EPA since.

Time/Resources Spent on this Case:

The company's inside general counsel (GC) did all the legal work. An estimated breakdown of time spent on this case is as follows:

GC time: 50-70 hours total CFO time: 30-40 hours total

Compliance director: 60-80 hours total Purchasing Manager: 60-80 hours total

This includes overlap as they had several calls with EPA where three to four company staff were on the call. They had to do significant recalculations and re-checks of their information to prove to the EPA they did not deserve to be penalized for certain items (this was a lot of data combing done by the compliance and purchasing managers, and then reviews and revisions by the GC and CFO). This is all tedious and seriously time consuming. The GC also drafted letter responses back and forth and those take a long time to get right.

The bottom line is that this small company was fortunate to have a talented GC who could lead the effort on this. The necessity to retain counsel would have led them to spend less time on it and just cave in and pay the fines. This is the usual cost/benefit analysis of paying money to lawyers to pay less money to the EPA, which is an all-too-common situation for small businesses like NACD members.

<u>Federal Insecticide, Fungicide, and Rodenticide Act Labeling</u> – *Still Pending* EPA Region 7

- A company in the Midwest purchased a label for a pesticide in 2011.
- EPA examined the label and instructed the company to make changes. The company did exactly as EPA asked.
- In 2013, the company decided to use a different (EPA-approved) vendor and alerted EPA. The company used the same label.
- EPA issued a Stop and Hold, asking the company to re-label. The company submitted to EPA and, upon further revisions, resumed business with the product.

- In 2016, EPA informed the company that information on the label was improper and issued a Stop and Hold.
- Of note:
 - o EPA approved this same information in 2013.
 - The company has been going back and forth for months with the EPA Office of Pesticide Programs and the Office of Enforcement and Compliance Assistance.
 - o EPA has noticed a penalty of \$160,000 as of May 2017.
 - The company has spent nearly \$250,000 on legal fees and communications with EPA.

Resource Conservation and Recovery Act Corrective Measures Study Approval Delays – Still Pending EPA Region 7

Extensive delays on remediation plan approvals at a facility in Kansas City.

In 1990, Elementis Chemicals and a subsidiary of Philips Electronics signed an Administrative Order on Consent (AOC) with EPA to conduct a Resource Conservation and Recovery Act Facility Investigation and Corrective Measures Study (CMS).

In 2001, Harcros was added to the AOC as a Respondent.

In October 2002, the Respondents submitted the CMS outlining the approach to remediate the property. The CMS proposed that certain areas of surface soil contamination would be capped, certain areas of subsurface soil would be subjected to treatment, indoor air would be addressed, and groundwater would be controlled and stabilized to prevent contaminants from migrating into uncontaminated areas and eventually to the Kansas River. To date, EPA has neither approved the 2002 submission nor provided comments, amounting to 14.5 years of review. The Respondents have approached EPA numerous times to break the silence and proceed with approving the CMS with no success. The Respondents met with EPA management, and the agency promised to review the CMS; however, the agency did not follow up. The Respondents approached the highest levels of EPA management each time in attempts to restart the project. The lack of feedback from EPA seemed to be caused by staffing issues rather than a controversial cleanup plan.

Because the Respondents sensed EPA's lack of progress in the early 2000s, they began to strategically implement the corrective measures. They designed a Soil Vapor Extraction System (SVE) in 2002 and submitted the plans and specs for EPA review. EPA said that if the SVE system was installed, it would be at the Respondent's own risk. They proceeded with installation of the SVE system on their own in a six-acre area (mid-area) of the facility and subsequently added a western tank dike area and a sub slab under the main warehouse. To date, they have removed 34,500 pounds of solvents from the vadose zone. They have also paved a few areas at their own risk to cover surface soil that exceeded corrective action goals. With respect to groundwater, they agreed to install two extraction wells on the river side of the levee as part of an AOC modification and pump 175 gallons per minute to maintain a capture zone that was sufficient to keep the plume from migrating. To date 3/4 of a billion gallons have been pumped

and treated from the extraction wells. Each extraction well captures a different plume (northern and southern plumes).

In 2010, a request was made to terminate pumping at extraction well EW-1 since the goals of the AOC had been met. EPA requested various technical information, which was quickly provided for review. Years went by with no response even though the Respondents submitted additional technical information as requested by the agency.

After six years of review, EPA approved the termination of pumping at EW-1. The most basic review took EPA years to accomplish while a group of qualified persons could have reviewed the same information and reached a conclusion in a matter of hours or days. EW-2 continues to pump at 100 GPM, and "at their own risk" the Respondents are addressing the southern plume by introduction of a carbon source to promote anaerobic degradation of the chlorinated solvents.

Three years ago, Harcros approached EPA after experiencing several derailments at the facility. The rail system needs to be upgraded to address a worn system and to handle heavier and longer rail cars. Harcros retained a design firm to upgrade the system to improve turning radius, install heavier track with additional spurs to handle more trans loading business, and improve secondary containment at loading/unloading stations. Since the soil beneath the rail tracks is contaminated above cleanup objectives, Harcros needed EPA's blessing on the extent of excavation and classification of the waste.

Three years later, Harcros still does not have approval to begin construction. EPA is being extremely conservative and frankly not in compliance with their own guidance for waste classification. In short, EPA believes all the excavated soil would be a listed waste, while the Respondents believe the waste would be subjected to characteristics testing. To form an opinion on this topic, Respondents gathered all spill information from their files and provided it to Arcadis for review. This review was comprehensive and included many documents from litigation between the Respondents. Arcadis prepared a 40-page white paper on the waste classification subject, and a meeting was held with EPA to discuss. An additional meeting was planned but was canceled by EPA due to the "transition of presidents."

There are many other details that may be relevant regarding this case, but this summary conveys the sense of frustration the Respondents have confronted on the project. Harcros is happy to provide additional details upon request.

<u>Toxic Substances Control Act (TSCA) – Failure to File a Premanufacture Notice</u> – <u>Settled</u> EPA Region 2

- 1. August 2013 The company was notified of a possible TSCA import matter. The company internally confirmed the same day materials in question were not on the public inventory.
- 2. August 2013 Company met with EPA officials at their offices in New Jersey.
- 3. September 2013 Company submitted requested documents/records to EPA officials.

- 4. November 2014 Company counsel reached out to EPA for a status update report.
- 5. January 2015 Counsel made contact with EPA (delays over the Christmas holidays).
- 6. February 2015 Company obtained agreement from supplier to accept a return of the material. (They had previously communicated to EPA disposal costs were excessive, and hazardous, at which point EPA agreed material could be returned to manufacturer in India).
- 7. June 2015 Consent agreement and no further action letter received. Then the company later determined it was only an internal EPA agreement on fines and not a final consent agreement.
- 8. December 2015 Official consent agreement received (only after requesting the document from the EPA and subsequently learning they originally sent it to the wrong contact; this also required the company and counsel to document the incorrect mailing and had EPA agree to accept a new timeline to execute the order and return the material, otherwise they risked failing to meet the imposed deadline in the agreement). A delinquency notice from the EPA was received and not cleared up until January 2016.
- 9. February 2016 Material was shipped to India.

The experience from start to "finish" was 30 months. The company's costs continued to climb as they had to pay storage/inventory costs on approximately 200,000 pounds of quarantined material.

From the company's side, it was more the lack of feedback from the EPA, and they were reluctant to "poke the sleeping giant" and thereby provoke the agency to take further action beyond the original scope of the issue.

<u>Brenntag Northeast Multi-Media Inspection</u> – *Settled* EPA Region 3

The following summarizes a timeline and events associated with the EPA's multi-media inspection of the Brenntag Northeast, Reading, Pennsylvania, facility.

- <u>July 29-30, 2014</u>: Representatives from EPA Region 3 began a facility inspection for compliance with the Resource Conservation & Recovery Act (RCRA). No results or findings were issued or discussed with Brenntag personnel at the conclusion of the visit.
- March 23, 2015: EPA provided Brenntag with an inspection report resulting from the July 29-30, 2014, visit and a Request For Information (RFI) pursuant to the Clean Water Act; RCRA; and the Comprehensive Environmental Response, Compensation, and Liability Act. The agency requested a full response to the RFI by May 11, 2015. Since the nature of RFIs is to request a significant amount of detailed information, typically EPA will grant an extension of time for submittals. However, in this case, Brenntag's

request for an extension and proposal to provide a rolling response over a period of time was denied by the agency. The unprecedented denial of the extension request signaled to us that EPA was not satisfied with the facilty's attention to regulatory detail in management of hazardous materials. After internal review of the inspection report by Brenntag legal counsel and a detailed tour of the facility, it was determined the EPA inspector(s) must have developed some incorrect impressions of the facility's preparedeness for a major spill event which, in turn, led EPA to believe mistakenly there were significant noncompliance issues. Ultimately, Brenntag informed EPA that their timeline request for RFI submittal was unreasonable and information would be provided as quickly as feasible. Brenntag provided the requested RFI material to the agency May 11, 18, 26, 27; June 5, 17, 30; and July 13, 18, 2015. Preparation of this response required approximately 650 workhours by Brenntag personnel and expense associated with guideance from environmental consultant and legal counsel.

- May 20, 2015: EPA inspectors returned to the facility to conduct a Clean Water Act and Spill Prevention inspection.
- August 26, 2015: Brenntag received report from EPA summarizing all inspection findings with allegations of 12 alleged violations. However, EPA did not provide any information on initial proposed penalties for the alleged violations. Based on similar violations imposed on other companies, the company's internal estimate of a proposed penalty was between \$350,000 and \$500,000. Brenntag began formulating a response to the alleged violations and requested a meeting with the agency to start the negotiation process.
- <u>September 15, 2015</u>: Brenntag submitted its intial response to the agency, denying seven of the 12 alleged violations. The agency agreed to meet at the facility September 25 to start negotiations.
- September 24, 2015: At approximately 4:30 PM, Brenntag received notification from the agency of their intent to cancel the originally agreed upon meeting date of September 25. This resulted in Brenntag incurring unnecessary cost associated with time/travel expense for key company personnel, environmental consultants, and external legal counsel. Furthermore, the agency informed Brenntag counsel of their intent to file the Administrative Compliant by the end of the month so as to meet a fiscal year-end deadline. Brenntag was also informed, verabally, that the initial proposed penalty for the 12 violations would be \$440,000.
- <u>September 30, 2015</u>: EPA filed the Administrative Complaint without meeting with Brenntag thus, effectively denying the company's right to due process to defend or rebut the alleged violations.

- October 30, 2015: Based on EPA's pre-Complaint conduct and communications, Brenntag decided a Settlement Conference with Regional Office personnel would not be helpful in resolving this issue. Therefore, a motion was filed by Brenntag counsel requesting utilization of the Alternative Dispute Resolution (ADR) process administered by the Office of Administrative Law Judges. Upon receipt of the ADR notification, the EPA's Regional Office Counsel immediately contacted Brenntag to request a meeting to negotiate this issue.
- November 20, 2015: Brenntag agreed to a meeting with EPA Regional Officials in their Philidalephia office December 4, 2015.
- <u>December 4, 2015:</u> Brenntag finally met with EPA Regional Officials to review the alleged violations and began the negotiation process. Furthermore, Brenntag invited the officials to the facility so they could see first hand the facility's condition and how it is operated. Facility meeting was agreed upon for December 11, 2015.
- <u>December 11, 2015</u>: EPA Regional Officials visited the Reading facility and negotiations continued.
- March 14, 2016: EPA and Brenntag signed a Consent Agreement and Final Order resolving the matter. Seven of the original 1) alleged violations were ultimately dismissed. The remaining five violations were all administrative and paperwork in nature. Brenntag agreed to a civil penalty of \$55,000 and a \$35,000 Supplemental Environmental Project to benefit the local fire department.

Although the final penalty imposed was excessive based on the nature of the violations, Brenntag made a business decision to settle so as not to incur additional expenses. What is extremely troubling was this EPA Region denying a regulated company the right to due process under the law in order to meet an arbitrary fiscal year deadline. It was obvious that meeting this deadline was more important to the agency than actually resolving this issue. Furthermore, the lack of willingness demonstrated by the agency to engage in good faith negotiations led to an increase in hostility and animosity between the parties. Instead of taking approximatley 20 months to resolve this issue, in reality, the case could have been completed within 90 days. In his 28-year career dealing with EPA, Brenntag's Director of Safety, Health, & Environment has never had a similar experience where a Region deviated so far away from standard operating protocol, demonstrated such an unwillingness to negotiate in good faith, and denied a company due process to defend against alleged violations.

From: Lynn L. Bergeson [lbergeson@lawbc.com]

Sent: 6/1/2017 10:39:20 AM

To: Morris, Jeff [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=55c34872e6ea40cab78be910aec63321-Morris, Jeff]

CC: Cleland-Hamnett, Wendy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=b84439fcdf02426abd539d8bb6c9ef6f-Cleland-Hamnett, Wendy]; Beck,

Nancy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=168ecb5184ac44de95a913297f353745-Beck, Nancy]; Jackson, Ryan

[/o=ExchangeLabs/ou=Exchange Administrative Group]

(FYDIBOHF23SPDLT)/cn=Recipients/cn=38bc8e18791a47d88a279db2fec8bd60-Jackson, Ry]; Gunasekara, Mandy

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Bolen, Brittany

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(FYDIBOHF23SPDLT)/cn=Recipients/cn=31e872a691114372b5a6a88482a66e48-Bolen, Brit]; Brown, Byron

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=9242d85c7df343d287659f840d730e65-Brown, Byro]; Mottley, Tanya

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=33a000296a364b0dad31fb9aaa34605d-Mottley, Tanya]; Schmit, Ryan

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=7077ecbac4914a00ad465398f92bbe78-Schmit, Ryan]; Charles M. Auer

[cauer@lawbc.com]; Richard E. Engler, Ph.D. [rengler@lawbc.com]; Oscar Hernandez, Ph.D.

[ohernandez@lawbc.com]

Subject: Polymers Issue Paper

Attachments: 00211098.pdf

Hello Jeff,

My colleagues, Charlie Auer, Oscar Hernandez, and Rich Engler, prepared the attached paper, which we offer for your consideration. The paper relates to the issue of using a chemical name to assist in managing new polymers. We hope you find the paper useful.

Best regards,

Lynn

LYNN L. BERGESON
MANAGING PARTNER
BERGESON & CAMPBELL PC

2200 Pennsylvania Avenue, N.W. Suite 100W | Washington, D.C. 20037 T: 202-557-3801 | F: 202-557-3836 | M: 202-257-2872 | lawbc.com May 31, 2017

Via E-Mail

Jeffery Morris, Ph.D.
Director
Office of Pollution Prevention and Toxics
Office of Chemical Safety and Pollution Prevention
U.S. Environmental Protection Agency
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Dr. Morris:

We took note of the recent determination by the U.S. Environmental Protection Agency's (EPA) Office of Pollution Prevention and Toxics (OPPT) under Section 5(a)(3)(C) of the Toxic Substances Control Act (TSCA) concerning a premanufacture notification (PMN) polymer that evidently was intended to be manufactured in a way that met the polymer exemption at 40 C.F.R. § 723.250. The specific PMN is:

Number: P-17-0227 TSCA Section 5(a)(3) Determination: Chemical substance not likely to present an unreasonable risk (5(a)(3)(C)).

Chemical Name: Generic: 2-Alkenoic acid, 2-alkyl-, alkyl ester, polymer with 2-alkyl 2-propenoate and -(2-alkyl-1-oxo-2-alken-1-yl--alkoxypoly(oxy-1,2-alkanediyl), ester with -2-alken-1-yl-hydroxypoly(oxy-1,2-alkanediyl); polymer exemption flag.

Polymer exemption flag: The chemical must be manufactured such that it meets the polymer exemption criteria as described under 40 C.F.R. § 723.250(e)(1), in addition to meeting the definition of polymer at 40 C.F.R. § 723.250(b).

We applaud OPPT's flexibility and creativity in taking the approach of using a flag to limit the polymers that could be made based on its determination. We recognize that this approach avoided the use of a regulatory action, such as a consent order and/or Significant New Use Rule (SNUR) that might otherwise have been needed to achieve the same end. We encourage EPA to develop guidance explaining the purpose of the flag and its effect, as this seems to be distinctly different from other Inventory flags that indicate some status (e.g., XU = exempt from the Chemical Data Reporting rule, S = proposed or final SNUR), but do not otherwise restrict the identity of the substance or how such a substance is manufactured.

{00501.063 / 111 / 00210638.DOCX 8} 2200 Peansylvania Avenue, NW, Suite 100W Washington, DC 20037-1701

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Jeffery Morris, Ph.D. May 31, 2017 Page 2

We also want to make available to OPPT a relevant work product that relates to the issue of using the chemical name to assist in managing new polymers. The enclosed paper was developed by Bergeson & Campbell, P.C.'s Charlie Auer, Rich Engler, and Oscar Hernandez, all former OPPT employees with extensive EPA experience in TSCA Section 5, and outlines broader and more flexible approaches to getting at and resolving the issues that were presented by polymer cases such as the PMN example cited above. The approaches discussed in the paper could be used as an alternative or as a complement to EPA's polymer exemption flag approach. In our view, the approaches and the reasoning discussed in the paper lay a foundation for a more comprehensive scheme that could also provide appropriate flexibility to EPA in meeting the legal and timing requirements under Section 5(a), while speeding up commercial innovation and the introduction of "safe" polymers.

We encourage OPPT to consider the points raised and the approaches outlined in the paper. We recognize that there are various ways that such approaches could be implemented through the use of the chemical identity and provide only a few examples. We would be pleased to meet with OPPT to discuss our thinking in more detail.

Sincerely,

Lynn L. Bergeson

Attachment

cc: Ms. Wendy Cleland-Hamnett (w/attachment) (via e-mail)

Nancy B. Beck, Ph.D. (w/attachment) (via e-mail)

Mr. Ryan Jackson (w/attachment) (via e-mail)

Mandy Gunasekara, Esquire (w/attachment) (via e-mail)

Ms. Brittany Bolen (w/attachment) (via e-mail)

Mr. Byron Brown (w/attachment) (via e-mail)

Tanya H. Mottley, Ph.D. (w/attachment) (via e-mail)

Mr. Ryan Schmit (w/attachment) (via e-mail)



Use of the Chemical Name in Managing New Chemical Polymers under the Amended Toxic Substances Control Act¹

May 31, 2017

1.0 Background

1.1 Identification of Polymers on the TSCA Inventory

Polymers make up about 30%² of the chemical substances included in the original Inventory created under the old Toxic Substances Control Act (TSCA, Pub. L. No. 94-469). "Chemical substance" is defined in TSCA Section 3(2)(A) to mean "any organic or inorganic substance of a particular molecular identity." EPA's guidance on polymers states that "[an] Inventory listing for each polymer describes a *category* of possible chemicals that would fit that substance name, instead of just representing a single molecular structure"³ and can vary within that listing in molecular weight (MW) and composition (e.g., the ratios or the order of reaction of the starting monomers). Most polymers on the Inventory are identified (or "named") in terms of the monomers used in their manufacture ("manufacture" also includes import) as well as other reactants (e.g., free-radical initiators, cross-linking agents) that become chemically incorporated into the polymer structure, subject to the two percent rule (see below). Other polymers are identified using Structural Repeating Unit representation. The two percent rule states that the description of the polymer must include monomers and chemically incorporated reactants used at

This proposal was developed by three former officials in the U.S. Environmental Protection Agency's (EPA) Office of Pollution Prevention and Toxics (OPPT), all of whom now work at Bergeson & Campbell, PC (B&C®): Charles M. Auer, Senior Regulatory and Policy Advisor, who both worked in and managed the new chemicals program in OPPT and was the OPPT Office Director when he retired in 2009 after 32 years at EPA; Richard E. Engler, Ph.D., Senior Chemist, who worked as an expert Toxic Substances Control Act (TSCA) chemist in OPPT's Industrial Chemistry Branch for 17 years where he participated in the review of thousands of new chemical notices; and Oscar Hernandez, Ph.D., Senior Regulatory Chemist, who worked as a risk assessor and manager in the Risk Assessment Division in OPPT for over 30 years and participated in the review of tens of thousands of new chemicals over his 30 year career in OPPT until his retirement as the Director of the Risk Assessment Division.

EPA, Overview: Office of Pollution Prevention and Toxics Laws and Programs (2008) (OPPT 101), available at http://archive.epa.gov/oppt/pubs/oppt101 tscalaw programs 2008.pdf.

EPA, Toxics Substances Control Act Inventory Representation for Polymeric Substances (1995) (emphasis added), available at https://www.epa.gov/tsca-inventory/polymeric-substances-tsca-inventory.



greater than two percent by weight, although monomers and reactants used at less than two percent may be included in the name.

1.2 Experience with New Chemical Polymers under Old TSCA

Approximately 60 percent of the new chemicals submitted to EPA as premanufacture notifications (PMN) under Section 5 of old TSCA were polymers. While some new chemical polymers were identified as a concern by EPA⁵ (examples include acrylate/methacrylate, polyanionic, and polycationic polymers), as discussed below, most new chemical polymers were generally considered by EPA to present low hazards, especially those that have high MW such that absorption by people or environmental organisms was limited and, as such, under old TSCA most PMN polymers were not regulated. In fact, OPPT developed an approach to "drop" low concern polymers based on initial review by its chemists that applied criteria, discussed below, developed over time by the new chemicals program based on its experience with new chemical polymers. Subsequently, these considerations and criteria served as the starting point for the TSCA Section 5(h)(4) polymer exemption under which certain polymers could be exempted from PMN requirements (codified at 40 C.F.R. § 723.250).

The best available description of the polymer drop criteria used by OPPT is found in EPA's Chemistry Assistance Manual for Premanufacture Notification Submitters issued in 1997:⁶

Based on its experience during the review of thousands of new chemical substances, EPA has identified a group of polymers (see below) that it believes poses no unreasonable risk of harm to human health or the environment. When a PMN substance in initial chemistry review falls within this group, the [OPPT's

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⁴ OPPT 101.

EPA, TSCA New Chemicals Program Chemical Categories (2010), available at https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/chemical-categories-used-review-new.

EPA, Chemistry Assistance Manual for Premanufacture Notification Submitters (1997), available at https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/chemistry-assistance-manual.



Industrial Chemistry Branch] chemist labels the case a "[CRSS⁷ drop]" and the Agency performs no further review.

* * *

For a polymer to be considered a [CRSS drop], it must satisfy all six of the following criteria:

- (1) It must belong to one of twelve (12) acceptable polymer classes: polyesters, polyamides and polyimides, polyacrylates, polyurethanes and polyureas, polyolefins, aromatic polysulfones, polyethers, polysiloxanes, polyketones, aromatic polythioethers, polymeric hydrocarbons, and phenolformaldehyde copolymers;
- (2) The levels of oligomer present in the polymer must be less than or equal to (a) 10 weight percent of polymer molecules with molecular weight less than 500 daltons and (b) 25 weight percent of polymer molecules molecular weight less than 1,000 daltons;
- (3) It must have no more than the level of ionic character permitted by the polymer exemption rule (generally a functional group equivalent weight for ionic groups greater than or to 5,000);
- (4) It must have (a) no reactive functional groups, (b) only reactive functional groups specifically excluded based on OPPT's risk assessment experience (e.g., blocked isocyanates), or (c) a reactive functional group equivalent weight no less than a defined threshold (e.g., for pendant methacrylates, the equivalent weight threshold is 5,000);
- (5) The lowest number-average molecular weight of the polymer must be less than 65,000 daltons but greater than 1,000 daltons; and
- (6) the polymer must not swell in water.

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CRSS is the Chemical Review and Search Strategy meeting held early in EPA's initial review of Section 5 notices.



These criteria have been developed for use by EPA, although they can by useful to submitters interested in developing low risk polymers. These criteria should not be confused with the criteria stated in the Polymer Exemption Rule ([40 C.F.R. § 723.250]), which specifically exempt certain polymers from PMN submission. (The above criteria were used, however, in the development of the Polymer Exemption Rule).

It has been the Agency's experience that polymers meeting these criteria have a low risk for causing adverse environmental and human health effects. Both the group of acceptable polymer classes and the reactive functional group are being updated and expanded as OPPT's experience in risk identification and assessment continues to grow. The actual figure varies from time to time, but, in general, many of the PMNs for polymers meet these criteria and are dropped from further review. (Many of these polymers also qualify for exemption and need not be reported at all.)

The CRSS drop criteria applied by OPPT may have changed since this description from 20 years ago, however. At a minimum, the criteria have been changed to reflect modifications made in the polymer exemption to exclude certain perfluorinated polymers (40 C.F.R. § 723.250).

Other examples of efforts to assess low concern polymers include the information developed by EPA for the Sustainable Futures program⁸ and an Organization for Economic Cooperation and Development (OECD) expert meeting considering criteria for identifying polymers of low concern.⁹ Both can provide additional insights that could be helpful in identifying and refining criteria for low concern polymers.

EPA, Sustainable Futures Interpretative Assistance Document (2013), available at https://www.epa.gov/sites/production/files/2015-05/documents/06-iad_polymers_june2013.pdf.

OECD, Data Analysis of the Identification of Correlations between Polymer Characteristics and Potential for Health or Ecotoxicological Concern (2009), available at https://www.oecd.org/env/ehs/risk-assessment/42081261.pdf.



2.0 Dealing with Polymers under Amended TSCA

Under new TSCA (Pub. L. No. 114-182), EPA is required to assess and make a determination on each PMN chemical that is submitted. The Section 5(a)(3) determinations include:

- (A) Presents an unreasonable risk;
- (B)(i) Information available is insufficient to permit a reasoned evaluation of the hazards;
- (ii)(I) May present an unreasonable risk;
- (ii)(II) Produced in substantial quantities and has substantial or significant exposure; and
- (C) Not likely to present an unreasonable risk.

If EPA makes any of the (A) or (B) determinations, it is required to regulate under Section 5(f) or (e), respectively, to the extent necessary to protect against an unreasonable risk. EPA is also required in making certain of the determinations and in regulating to consider the "conditions of use" of the new chemical, a term that as defined (TSCA Section 3(4)) includes "intended, known, or reasonably foreseen" circumstances for manufacture, processing, and use, among others. New chemical polymers as notified may be intended to be manufactured only at high MW but, because of the way they are named for the Inventory, as noted by EPA in its Polymer Guidance, a given polymer describes a category of possible chemicals that would fit that substance name and could vary in MW and composition. Thus, as a result of this polymer naming convention, although notified as a high MW polymer, other forms of the polymer could present particular issues when considering reasonably foreseen circumstances that include manufacture at a lower MW. Other reasonably foreseen aspects could include manufacture of forms of the new polymer within the category described by the name that are relatively more water soluble or reactive (such that the reactive functional group equivalent weight is lower). Such changes could present increased concerns relative to those for a high MW, insoluble, and less reactive form of the new polymer that is the subject of the PMN. Thus, while the PMN polymer when manufactured as intended could meet CRSS drop criteria (as described above) and be designated as "not likely" to present an unreasonable risk, other reasonably foreseen forms of the polymer could present concerns.

If EPA makes a (C) determination of "not likely to present an unreasonable risk," the notifier can begin manufacture once the determination has been made and EPA is required by Section 5(g) to

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publish a statement of its finding in the *Federal Register* (*see*, *e.g.*, 82 Fed. Reg. 19044, (Apr. 25, 2017)). The *Federal Register* notice includes a link to the EPA determination for each such PMN (*see*, for example, https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/tsca-section-5a3c-determination-39).

EPA in its early efforts to implement new TSCA seems to be taking a precautionary approach to new polymers that likely results from the need to make a determination that can include consideration of reasonably foreseen conditions of use. This arguably requires EPA to consider the potential risks associated with reasonably foreseen forms of the polymer that differ from that intended by the notifier and, to the extent this results in EPA not being able to support a "not likely" determination, may force EPA to regulate under Section 5(e). Table 1 presents outcome statistics for PMNs under new TSCA. As can be seen, EPA has indicated its intention to regulate 21 percent of the PMNs under Section 5(e) on the basis of reasonably foreseen uses (an additional 46 percent of the PMNs are slated for regulation under Section 5(e) on the basis of intended and reasonably foreseen uses). Recognizing that about 60 percent of the PMNs submitted to EPA under old TSCA were polymers suggests that a significant portion of the cases represented by the 21 percent figure are polymers. It is likely that potential manufacture of the new polymer in a form other than as described in the PMN (e.g., as a lower MW form) is an important contributor to the reasonably foreseen circumstances that are triggering EPA's intention to pursue regulatory action.

Typically, regulation of new chemical polymers takes the form of an order under Section 5(e) and/or a Significant New Use Rule (SNUR) under Section 5(a)(2). Although EPA has stated that it could not use a "non-5e SNUR" (using, for example, the procedures at 40 C.F.R. § 721.170) to accomplish the needed control, this reluctance may be changing. Among the options, a non-5e SNUR seems to present the least potential for delay although, if not implemented carefully, such a SNUR could present regulatory burdens (regulatory compliance and recordkeeping) to the submitter and downstream customers and, in the case of exports, result in the need for export notices under Section 12(b). Another similar option is to impose a boilerplate Section 5(e) consent order that obligates the submitter to the SNUR conditions without imposing testing; furthermore, the consent order could be written to expire upon publication of the final SNUR. Such a policy would reduce the often extensive negotiations related to developing consent orders.

As discussed at the outset, EPA has developed and applies an approach to naming polymers that in effect creates a category of possible polymers that can vary in MW, composition, properties, and so on. When manufactured as an existing chemical, the substance produced must be consistent with the name/identity (including the definition, if one is included) on the Inventory. This thus constitutes a legal requirement that the named monomers must be present, but imposes no other limitations on the make-up of the polymer product. Given the need for EPA to review



and make determinations on all PMN chemicals, and considering reasonably foreseen conditions of use that, based on a name that describes a category of polymers could result in production of polymers that differ in MW or in other important ways from the intended polymer described in the PMN, might there be approaches wherein EPA could develop a new way to identify substance categories (like polymers) such that the name itself provides a way of ensuring that such substance categories consist of a subcategory of polymers that are of low concern and could satisfy the "not likely" determination including consideration of reasonably foreseen conditions of use? The use of such a "subcategory" naming approach is explored in the next section.

3.0 Discussion of an Approach to Using Chemical Name/Identity to Create Subcategories of New Chemical Polymers as an Alternative to Reduce the Burdens and Complexity of Regulation under Section 5

EPA has developed and applied criteria for identifying "polymers of low concern" in the polymer exemption and in the informal CRSS drop process described earlier. In the case of the polymer exemption, polymers made under the exemption must meet specific requirements consistent with the polymer subcategory represented by the exemption. In the case of CRSS drops under old TSCA, the polymer as notified, based on EPA's review, was judged to meet the applicable criteria for such drops as developed by EPA. These criteria include certain limitations in the classes of polymers that are eligible, the MW of the new polymer, the presence of reactive functional groups over a certain threshold, and other properties and characteristics. Although it represents a departure from current practices for naming TSCA polymers, approaches to naming could be developed to take advantage of the fact that a polymer as named for the Inventory represents a category of possible substances and, by careful use of the chemical name, EPA can create a subcategory that distinguishes polymers that meet some specific requirements that would lead to low concern (e.g., that meet the polymer exemption or CRSS drop criteria) from polymers that contain the same monomers, but need not meet these low concern criteria when The approach is to divide the category of substances represented by the undifferentiated polymer name from the subcategories that meet the low hazard criteria. By taking this subcategory approach, EPA can justify making a "not likely" determination for such polymers and meet its statutory obligations without the need for costly and time-consuming regulatory action (e.g., a consent order and SNUR). (It is recognized that there are instances where EPA can determine that a new chemical polymer named in the usual TSCA manner is not likely to present an unreasonable risk (see, for example, "determination-39" referenced above). The subcategory naming approach is not relevant in such cases.) Furthermore, the requirement under new TSCA that EPA, in making a "not likely" determination, must publish a statement of its findings can be used to make public EPA's rationale for applying a subcategory approach to naming the polymer.



In the following examples, the capital letters indicate monomers or chemically incorporated reactants that would be used to name a TSCA polymer. The examples illustrate approaches that could be taken in naming/identifying new chemical polymers as subcategories, and it is recognized that there are other constructions that could be found useful.

- A, polymer with B, C, and D, E initiated, polymer exemption eligible.
 - Inventory guidance would be developed to make clear that the underlined, term when present in the name, requires that the polymer, as manufactured, is a subcategory that must meet the terms of the current polymer exemption.
- A, low concern polymer with B, C, and D, E initiated.
 - Inventory guidance would be developed to make clear that the underlined term, when present in the name, indicates that EPA has reviewed the polymer as a new chemical and determined that it is not likely to present an unreasonable risk. The guidance would also discuss and make clear that this term, when present in the name, requires that such polymers when manufactured must meet the relevant subcategory criteria (such as the polymer exemption or CRSS drop criteria) that would be elaborated and, as needed, kept current in the guidance.
- A, polymer with B, C, and D, E initiated, <u>low concern.</u>

Definition: Meets the definitions and criteria in 40 C.F.R. § 723.250(b), (d), and (e).

Similar to the "polymer exemption eligible" option above, the Inventory listing for this subcategory would include a definition that cross-references the criteria necessary for EPA to find low concern. This example shows a reference to the polymer exemption and the approach suggested makes all of the flexibility present in the polymer exemption available to the PMN manufacturer. The definition could also reference the CRSS drop criteria as elaborated in Inventory guidance, or be specific for a particular PMN. Such criteria might include a limitation on the MW or the content of a functional group of concern. The Federal



Register reference to EPA's not likely determination on the PMN could also be noted in the definition.

EPA's current guidance on the role of a definition in the chemical name clarifies EPA intent with regard to the effect of a definition. For example:

In its guidance document for UVCB substances (unknown or variable composition, complex reaction products and biological materials), EPA makes the following statement: 10

These substances have supplemental definitions that are considered integral parts of the names for TSCA purposes. In general, the definitions serve to narrow the scope of the CA Names. Thus, any substance that matches a CA Name on the TSCA Inventory but is not covered by the corresponding substance definition is not considered to be covered by that Inventory name.

In the guidance document for complex reaction products, EPA makes the following statement:¹¹

[D]efinitions are often developed to supplement the chemical names if the name itself does not adequately define the characteristics and limitations of the substance category. The definition often describes the scope of composition by indicating such information as the typical or allowed carbon number ranges or physical property ranges, the types of atoms or substances that may be included, and the allowed raw material sources or processes of manufacture. For all substances that have a supplemental definition, that definition is considered to be part of that name for TSCA purposes.

EPA, Toxic Substances Control Act Inventory Representation for Chemical Substances of Unknown or Variable Composition, Complex Reaction Products and Biological Materials: UVCB Substances (1995), available at https://www.epa.gov/sites/production/files/2015-05/documents/uvcb.pdf.

EPA, Toxic Substances Control Act Inventory Representation for Combinations of Two or More Substances: Complex Reaction Products (1995), available at https://www.epa.gov/sites/production/files/2015-05/documents/rxnprods.pdf.



All three of these options will potentially lead to separate subcategory listings on the Inventory for polymers that are made from identical monomers. For example, one subcategory that is identified in a specified way (e.g., meeting the polymer exemption criteria) and one that does not include such a specification. Although this could lead to a proliferation of entries on the Inventory, in practice, such an outcome is not likely. The approach would be used with notified new chemical polymers (ones for which EPA is required to make a determination) and such polymers would either present an opportunity to be named/identified as a subcategory meeting low concern criteria (such as those in the polymer exemption or CRSS drop), or not. If the polymer as notified presents concerns such that the "not likely" determination cannot be made, EPA would impose restrictions to protect against the identified unreasonable risk using a consent order and/or SNUR rather than seeking to apply a subcategory.

A system that uses the chemical identity to create subcategories that limit the forms of the polymer that can be manufactured under that name provides strong protection with minimal EPA resources and no consent order or SNUR is required to produce this outcome. This way, the delay in realizing the innovation benefits of such "safe" polymers would be minimized. Arguably EPA could make the "not likely" determination on such polymers early in the PMN review process, as was the case for CRSS drops under old TSCA; furthermore, under new TSCA, manufacture can commence once the determination was made. The time and expense associated with developing and issuing the consent order and SNUR would be saved, and the impacts of regulatory actions on the supply chain are minimized.

We acknowledge that the subcategory naming approach discussed above is a departure from the long-standing current system of identifying polymeric chemical substances under TSCA. However, as EPA states, polymer listings on the Inventory are categories of substances and EPA can certainly develop nomenclature methodology that permits dividing a particular category into subcategories. The statutory obligations under new TSCA impose significant new requirements on EPA, manufacturers, and others in the supply chain; a creative solution such as incorporating low concern criteria in a substance's identity to create a low concern polymer subcategory will allow all parties to focus their limited resources managing substances that may present unreasonable risks, as opposed to subcategories of low hazard substances that are not likely to present such risks.



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Table 1. PMN Statistics under New TSCA (https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/interim-status-section-5-notices)

	Cases Reviewed
	under Amended
	TSCA
PMNs Submitted	513
Invalid	39 (8%)
PMNs reviewed through March 13, 2017	322
Determinations:	
5(e) regulation Insufficient information	71 (21%)
5(e) regulation May present unreasonable risk for	148 (46%)
intended and reasonably foreseen uses	
5(e) regulation May present unreasonable risk for	68 (21%)
reasonably foreseen uses	
5(e) regulation Exposure based	0 (0%) (?)
Not likely to present an unreasonable risk	35 (11%)

From: Michael Formica [formicam@nppc.org]

Sent: 5/18/2017 2:04:02 PM

To: Greenwalt, Sarah [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=6c13775b8f424e90802669b87b135024-Greenwalt,]; Gunasekara, Mandy

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Fotouhi, David

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=febaf0d56aab43f8a9174b18218c1182-Fotouhi, Da]

CC: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]

Subject: RE: CAFO Air Emissions Court Decision

Attachments: CA8 decision in AFBF v. EPA.PDF; 13 CV 1751 156 Stipulation of Dismissal.pdf

Sarah, Mandy, David

Just wanted to follow up with you on the meeting last week regarding livestock air emissions, see if EPA (or the Department of Justice) has made any decision on its next steps, and if there was any additional information you and your team needed from us.

Also, one of the items I mentioned last week was the recent decision in the 8th Circuit regarding farmers right to privacy and the application of FOIA Exemption 6 to the release of farmer records. I've attached a copy of both the 8th Circuit decision as well as the settlement NPPC and Farm Bureau reached with EPA regarding the 8th Circuit decision.

Thanks for your continued attention to this.

Michael C. Formica National Pork Producers Council 202.680.3820

From: Michael Formica

Sent: Friday, May 12, 2017 4:39 PM

To: 'Greenwalt, Sarah' <greenwalt.sarah@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Fotouhi,

David <fotouhi.david@epa.gov>

Cc: Schwab, Justin <schwab.justin@epa.gov> **Subject:** RE: CAFO Air Emissions Court Decision

Sarah, Mandy, David,

Thanks for taking the time to meet with our coalition of livestock agricultural groups this morning to discuss potential responses to the DC Circuits decision on emission reporting under CERCLA and EPCRA. Please let me know if there are any specific materials, or other assistance we can provide, to help in your evaluation of the potential next steps to take.

Thanks again for taking the time to meet with us. Have a great weekend.

Michael C. Formica National Pork Producers Council From: Greenwalt, Sarah [mailto:greenwalt.sarah@epa.gov]

Sent: Thursday, May 11, 2017 2:57 PM

To: Michael Formica < formicam@nppc.org>; Washington, Valerie < Washington. Valerie@epa.gov>

Cc: Fotouhi, David <fotouhi.david@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Gunasekara, Mandy

<Gunasekara.Mandy@epa.gov>

Subject: RE: CAFO Air Emissions Court Decision

Look forward to seeing you all.

Sarah A. Greenwalt

Senior Advisor to the Administrator for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency Work: 202-564-1722 | Cell: 202-816-1388

Greenwalt.Sarah@epa.gov

From: Michael Formica [mailto:formicam@nppc.org]

Sent: Thursday, May 11, 2017 2:53 PM

To: Greenwalt, Sarah <<u>greenwalt.sarah@epa.gov</u>>; Washington, Valerie <<u>Washington.Valerie@epa.gov</u>> **Cc:** Fotouhi, David <<u>fotouhi.david@epa.gov</u>>; Schwab, Justin <<u>schwab.justin@epa.gov</u>>; Gunasekara, Mandy

<Gunasekara.Mandy@epa.gov>

Subject: RE: CAFO Air Emissions Court Decision

Sarah

Looking forward to meeting tomorrow morning at 11am.

In addition to myself, I'll be joined by the following folks representing various livestock groups.

Richard Schwartz	Crowell Moring
Michael Formica	National Pork Producers Council
Christian Richter	Consultant, representing US Poultry & Egg
Andrew Walmsley	American Farm Bureau Federation
Tom Hebert	Consultant, representing NPPC & United Egg Producers
Lisa Van Dorn	National Council of Farmer Cooperatives
Scott Yager	National Cattlemen's Beef Association
Clay Detlefsen	National Milk Producers Federation

Let me know if you need anything else Thanks

Michael C. Formica Assistant Vice President & Legal Counsel, Domestic Policy National Pork Producers Council 202.680.3820 From: Greenwalt, Sarah [mailto:greenwalt.sarah@epa.gov]

Sent: Monday, May 08, 2017 9:25 PM

To: Michael Formica <formicam@nppc.org>; Washington, Valerie <Washington.Valerie@epa.gov>

Cc: Fotouhi, David <fotouhi.david@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Gunasekara, Mandy

<Gunasekara.Mandy@epa.gov>

Subject: Re: CAFO Air Emissions Court Decision

Michael, would Friday morning at 11:00-11:30am work for you guys?

Sent from my iPhone

On May 8, 2017, at 5:04 PM, Greenwalt, Sarah <greenwalt.sarah@epa.gov> wrote:

Thanks, Michael. Let me circle up with my folks to find a good time. Will get back to you as soon as I can.

Sarah A. Greenwalt

Senior Advisor to the Administrator for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency Work: 202-564-1722 | Cell: 202-816-1388

Greenwalt.Sarah@epa.gov

From: Michael Formica [mailto:formicam@nppc.org]

Sent: Monday, May 8, 2017 4:51 PM

To: Greenwalt, Sarah <<u>greenwalt.sarah@epa.gov</u>>; Washington, Valerie <<u>Washington.Valerie@epa.gov</u>> **Cc:** Fotouhi, David <<u>fotouhi.david@epa.gov</u>>; Schwab, Justin <<u>schwab.justin@epa.gov</u>>; Gunasekara,

Mandy < Gunasekara. Mandy@epa.gov >

Subject: RE: CAFO Air Emissions Court Decision

Sarah,

Great to see you earlier today. Just following up here and hoping to get some time scheduled this week for our livestock coalition to come in and speak with you and your team. We are quickly coming up on a May 26th deadline for EPA to appeal or seek a rehearing on this case. We are available to come in and meet with you at any time that is convenient for your team.

Thanks again.

Michael C. Formica National Pork Producers Council 202.680.3820

From: Greenwalt, Sarah [mailto:greenwalt.sarah@epa.gov]

Sent: Thursday, May 04, 2017 10:10 PM **To:** Michael Formica < formicam@nppc.org>

Cc: Washington, Valerie < <u>Washington.Valerie@epa.gov</u>>; Fotouhi, David < <u>fotouhi.david@epa.gov</u>>; Schwab, Justin < schwab.justin@epa.gov>; Gunasekara, Mandy < Gunasekara.Mandy@epa.gov>

Subject: Re: CAFO Air Emissions Court Decision

Would be happy to discuss, Michael.

Valerie, please find some time on my calendar next week that also works for Justin and David. Thanks!

Sent from my iPhone

On May 3, 2017, at 12:21 PM, Michael Formica <formicam@nppc.org> wrote:

Sarah,

Thanks for sticking around and speaking with us this morning after the Ag Stakeholders meeting with the Office of Water. Wanted to follow up with you and try to schedule a time this week for the various livestock groups to come in and chat with you and EPA's other senior staff about the recent DC Circuit Decision on reporting air emissions from CAFOs.

Please let me know if there is a time that works well on your end for a more substantive discussion.

Thanks

Michael C. Formica National Pork Producers Council 202.680.3820

AGRICULTURE

Court rejects Bush rule exempting CAFOs from reporting

Amanda Reilly, E&E News reporter

Published: Tuesday, April 11, 2017 <image001.jpg>

A federal court tossed out a 2008 U.S. EPA rule exempting animal feeding operations from reporting pollution discharges. Photo by United States Geological Survey, courtesy of Wikipedia.

In a win for environmentalists, a federal court today tossed a George W. Bush-era rule exempting animal feeding operations from certain pollution reporting requirements.

A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit agreed with green groups that lawmakers never intended to give U.S. EPA the authority to exclude those operations.

Congress didn't "give the agency carte blanche to ignore the statute whenever it decides the reporting requirements aren't worth the trouble," Judge Stephen Williams, a Reagan appointee, wrote for the court.

The court also found that manure storage at livestock operations poses more than a "theoretical" risk to public health.

At issue is a rule that EPA adopted in December 2008 exempting all animal feeding operations from reporting releases of hazardous air pollution from animal waste under the Comprehensive Environmental Response, Compensation and Liability Act.

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Typically, facilities covered by CERCLA have to report discharges of pollutants above certain thresholds to a National Response Center.

EPA's rule also exempted all but large concentrated animal feeding operations, or CAFOs, from reporting emissions to local and state emergency officials under the Emergency Planning and Community Right-to-Know Act.

The Waterkeeper Alliance, the Humane Society of the United States and other environmental groups filed the lawsuit, arguing that the rule put citizens at risk of breathing harmful ammonia and hydrogen sulfide.

EPA, though, said that requiring producers to report under CERCLA would be burdensome and fruitless because "local response agencies are very unlikely to respond" to reports of pollution. The government also argued that EPA lacked information on how to go about measuring emissions.

EPA noted that the statutes contained unrelated reporting exceptions, including one for releases of engine exhaust. The agency argued that it should be afforded deference under the *Chevron* legal doctrine because there was ambiguity over whether it could carve out new exemptions that weren't specifically written into the statute.

But Williams rejected those arguments, writing that Congress didn't mean for EPA to fashion new exemptions.

"Read together the statutory provisions set forth a straightforward reporting requirement for any non-exempt release," Williams wrote.

"Conspicuously missing," he added, "is any language of delegation, such as that reports be 'as appropriate,' 'effective,' 'economical,' or made 'under circumstances to be determined by the EPA.""

Williams also rejected EPA's arguments that the environmentalists didn't have legal standing to sue because they couldn't show a concrete harm tied to EPA's reporting exemption. He agreed with the environmental groups that they have been harmed because they have been deprived of information about livestock operations (<u>E&E News PM</u>, Dec. 12, 2016).

The judge also slammed EPA's arguments about the fruitless nature of reporting: "We find that those reports aren't nearly as useless as the EPA makes them out to be," he wrote.

While acknowledging that it's difficult to measure releases from animal operations because emissions don't come out of a smokestack, Williams wrote that releases can pose a serious risk.

"Anyone with a pet knows firsthand that raising animals means dealing with animal waste," he wrote. "But many of us may not realize that as the waste breaks down, it emits serious pollutants — most notably ammonia and hydrogen sulfide."

When manure that's sitting in storage is agitated for pumping, it can stir up emissions of the hazardous air pollutants, Williams said.

The risk from manure storage "isn't theoretical," Williams wrote. "People have become seriously ill and even died as a result of pit agitation."

Along with vacating the 2008 rule, the court also dismissed as moot a lawsuit by the National Pork Producers Council challenging EPA's decision to require large CAFOs to report under the right-to-know law.

Chevron skepticism

Judges Janice Rogers Brown, a Republican appointee, and Sri Srinivasan, an Obama appointee, heard the case with Williams.

In a concurring opinion, Brown said she agreed with the court's finding but said she was skeptical about some of the recent debate in legal circles about the two-step analysis that courts typically undertake under the *Chevron* doctrine.

Under the first step, courts look to whether Congress has been silent or ambiguous on an issue. The second step requires an analysis of whether an agency has acted reasonably.

While she agreed that the D.C. Circuit did the proper *Chevron* analysis in the case at hand, Brown said she worried that some scholars advocate leaving out the first step and simply looking at whether a federal agency action is reasonable.

"Congress is out of the picture altogether," she wrote. "Agencies are free to experiment with various interpretations, and courts are free to avoid determining the meaning of statutes."

"It isn't fair. It isn't nice," Brown wrote, quoting the Frank Sinatra song "Luck Be A Lady."

Leaving out the first step, she said, would implicate the separation of powers concerns that Justice Neil Gorsuch — then a judge on the 10th U.S. Circuit Court of Appeals — raised in an August 2016 concurring opinion. Gorsuch, who was sworn in for a seat on the Supreme Court yesterday, has questioned whether *Chevron* is still a valid legal doctrine.

Collapsing the two-step analysis, Brown said, was "yet another reason to question Chevron's consistency" with judges' duty to "say what the law is."

Click here to read the court's opinion

<Waterkeeper (09-1017) Opinion.pdf>

Woollums, Cathy S [CSWoollums@berkshirehathawayenergyco.com] From:

Sent: 5/19/2017 8:50:20 PM

To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group

> (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; srinivasan.guatam@epa.gov; Zenick, Elliott [/o=ExchangeLabs/ou=Exchange Administrative Group

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stephanie.talbert@usdoj.gov; debra.carfora@usdoj.gov; jack.lipschultz@usdoj.gov

CC: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]

Subject: Regional Haze Judicial Stay

Attachments: PPW Motion For Stay.pdf; 2014 0909 Order Granting Motions to Stay.pdf; 2017 0517 Order Re Abatement.pdf

Attached are PacifiCorp's motion for judicial stay, the 10th Circuit's 2014 grant of the stay in the Wyoming regional haze case (extending compliance beyond the five year statutory period for the duration of the stay), and the May 17, 2017, order from the 10th Circuit abating proceedings which allows the stay of the FIP compliance deadline to remain in effect.

Cathy S. Woollums Sr. Vice President, Environmental and Chief Environmental Counsel Berkshire Hathaway Energy 106 E. Second Street Davenport, IA 52801 563-333-8009 (office) 563-320-1505 (cell) cswoollums@berkshirehathawayenergyco.com

From: Woollums, Cathy S [CSWoollums@berkshirehathawayenergyco.com]

Sent: 5/19/2017 8:48:09 PM

To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; srinivasan.guatam@epa.gov; Zenick, Elliott [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=1b2eaa2a560d415fb7c8ce9bb56c7ce5-EZENICK]; Greenglass, Nora

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=6224d63d775847a0850cbf3f8be773ea-Greenglass,];

stephanie.talbert@usdoj.gov; debra.carfora@usdoj.gov; jack.lipschultz@usdoj.gov

CC: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]

Subject: Utah Regional Haze Reconsideration

Attachments: Deserte Power Petition for Reconsideration cr - 2(1).pdf; UAMPS Request for Reconsideration.pdf; Application for

Admin Stay.pdf; Decl in Supp of Request for Stay.pdf; Request for Reconsideration - EPA Utah RH FIP.s.pdf

Attached are copies of the parties' requests for reconsideration in the Utah regional haze matter as well as the State of Utah's application for administrative stay. I will forward via separate email the motion for stay filed in the Utah case and 10th Circuit's order from 2014 imposing a judicial stay in Wyoming.

In addition, I will provide potential dates on Monday for a follow-up meeting. Please don't hesitate to contact me with any questions.

Regards,

Cathy S. Woollums
Sr. Vice President, Environmental
and Chief Environmental Counsel
Berkshire Hathaway Energy
106 E. Second Street
Davenport, IA 52801
563-333-8009 (office)
563-320-1505 (cell)
cswoollums@berkshirehathawayenergyco.com

From: KUNZ David [david.kunz@arkema.com]

Sent: 5/22/2017 9:05:30 PM

To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]

Subject: Arkema Meeting - confirmation

Mandy,

Hi. I just wanted to touch base to confirm our meeting with you and Nancy Beck on Wednesday, May 24th at 10 am at EPA Headquarters, 1200 Pennsylvania Avenue, NW North (3415). We very much appreciate your time and consideration.

Joining me will be: Allen Karpman, Director of Government Activities, Fluorochemicals and Rebecca Bernstein, Senior Director, Product Safety and Regulatory Affairs.

We are hoping to discuss HFC regulations going forward (particularly timelines for transitioning to next generation materials), the Kigali Amendment and some TSCA implementation issues. Just to make sure you know, Arkema is a party to lawsuits challenging two EPA SNAP delisting rules that address HFCs, but we are not coming in on Wednesday to talk about issues in the litigation.

Thanks again - look forward to seeing you.

David

David E. Kunz

Arkema Inc. Office: (202) 263-3491

Cell: (202) 257-1115 david.kunz@arkema.com www.arkema.com



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From: Jennifer Gibson [JGibson@NACD.com]

Sent: 5/22/2017 7:05:10 PM

To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Beck, Nancy

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=168ecb5184ac44de95a913297f353745-Beck, Nancy]

CC: Eric Byer [ebyer@NACD.com]

Subject: NACD Member Egregious Enforcement Case - Time Sensitive **Attachments**: BrenntagMid-South(SARA 313)Violation{051917}.pdf

Dear Mandy and Nancy,

It was nice to see you last week at NACD's meeting with Administrator Pruitt. As a follow up, Eric Byer and I are working to collect troubling enforcement examples from our members with a goal of getting these to you this week, or early next at the latest.

In the meantime, one of our members, Brenntag, reached out to me on Friday with an immediate example from Region 4. EPA is proposing a five-figure penalty for failure to hit the certify button for one chemical when submitting a Toxic Release Inventory report. A description of the case is attached. This is a perfect example of extreme monetary penalties issued for minor administrative errors that result in no harm to the environment and of the "Find & Fine" enforcement approach we discussed. In this case, even the agency's rationale for the large penalty is flawed.

Can you assist with this? We are curious to know if Region 4 even vetted this penalty through EPA headquarters as this seems completely contrary to the approach Administrator Pruitt indicated he would like the agency to take.

Please let me know if you need any additional information. Thank you so much for your consideration.

Best regards,

Jennifer

Jennifer C. Gibson Vice President, Regulatory Affairs

National Association of Chemical Distributors (NACD)



1560 Wilson Blvd., Suite 1100 Arlington, VA 22209 (703) 527-6223 x3047 - Main Line (703) 527-7747 - Fax (571) 482-3047 - Direct (703) 989-3261 - Cell jgibson@nacd.com

Linked



From: KUNZ David [david.kunz@arkema.com]

Sent: 5/25/2017 9:14:20 PM

To: Beck, Nancy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=168ecb5184ac44de95a913297f353745-Beck, Nancy]; Gunasekara, Mandy

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Dominguez, Alexander

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=5ced433b4ef54171864ed98a36cb7a5f-Dominguez,]

CC: BERNSTEIN Rebecca [rebecca.bernstein@arkema.com]; KARPMAN Allen [allen.karpman@arkema.com]

Subject: Thank you

Mandy, Nancy, Alex,

Many thanks, again, for your time yesterday.

We know you have a lot on your plates, so we really appreciated it even more.

Please do not hesitate to contact us if we can provide any additional information, and we look forward to staying in touch.

Again, thank you for your time and consideration.

David, Rebecca, Allen

David E. Kunz

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From: Eule, Stephen [SEule@USChamber.com]

Sent: 4/25/2017 1:16:10 PM

To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]

Subject: Paris

Mandy: One thing I think you need to do if you haven't done it already is to have someone from the administrator's office call over to State (the counsel's office or Trigg Talley or Sue Biniaz) and ask for a provisions-by-provision assessment of the Paris Agreement detailing what is and isn't legally binding on the U.S. Might help inform your discussions. Cheers. Steve

Stephen Eule
Vice President for Climate & Technology
Institute for 21st Century Energy
U.S. Chamber of Commerce
202 463 5654
seule@uschamber.com
www.energyxxi.org

From: Gunasekara, Surya [Surya@mail.house.gov]

Sent: 4/20/2017 2:47:26 PM

To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]

Subject: RE: Meet the Cabinet Series - Member Meeting with EPA Administrator Scott Pruitt - 4/27 at 9:15 AM - HC-5

Not allowed, but you should go!

From: Gunasekara, Mandy [mailto:Gunasekara.Mandy@epa.gov]

Sent: Thursday, April 20, 2017 10:36 AM

To: Gunasekara, Surya

Subject: RE: Meet the Cabinet Series - Member Meeting with EPA Administrator Scott Pruitt - 4/27 at 9:15 AM - HC-5

Fun! You should go with Jim #chiefsarememberstoo!

From: Gunasekara, Surya [mailto:Surya@mail.house.gov]

Sent: Thursday, April 20, 2017 10:35 AM

To: Gunasekara, Mandy < Gunasekara. Mandy@epa.gov>

Subject: FW: Meet the Cabinet Series - Member Meeting with EPA Administrator Scott Pruitt - 4/27 at 9:15 AM - HC-5

From: House Republicans [mailto:HouseRepublicans=mail.gop.gov@mail29.atl11.rsgsv.net] On Behalf Of House

Republicans

Sent: Thursday, April 20, 2017 10:31 AM

To: Gunasekara, Surya

Subject: Meet the Cabinet Series - Member Meeting with EPA Administrator Scott Pruitt - 4/27 at 9:15 AM - HC-5

Meet the Cabinet Series - Member Meeting with EPA Administrator Scott Pruitt - 4/27 at 9:00 AM - HC-5 View this email in your browser



Thursday, April 27, 2017 9:15 AM HC-5, The Capitol

Please RSVP Members Here

Conference Chair Cathy McMorris Rodgers is excited to continue the *Meet the Cabinet* Series. Over the next few months the Chair will continue to bring in members of President Trump's cabinet to provide an opportunity for members of the Conference to meet and build a relationship with them and their teams.

MEMBERS ONLY







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From: Brunner, Jan (EPW) [Jan_Brunner@epw.senate.gov]

Sent: 4/4/2017 12:34:05 PM

To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]

Subject: Re: Morning Energy: Warning sent to Pruitt from retiring official — Brouillette formally tapped to be DOE deputy —

HFC deal backers playing it cool with Trump team — Mike Bloomberg bashes Trump's coal jobs promise

Attachments: removed.txt

Pick day during recess. Will come your way. Also tell RJ and Byron I miss them. Shit. And Brittany and Tatertot...damn it all my friends are at EPA. All I got left is Herrgott.

Sent from my iPhone

On Apr 4, 2017, at 8:00 AM, Gunasekara, Mandy < Gunasekara. Mandy@epa.gov > wrote:

I miss you – have much to tell. Can't wait to catch up. I'm glad you and Elizabeth hit it off! She's aweseome

From: Brunner, Jan (EPW) [mailto:Jan Brunner@epw.senate.gov]

Sent: Tuesday, April 4, 2017 7:50 AM

To: Gunasekara, Mandy < Gunasekara. Mandy@epa.gov>

Subject: Fwd: Morning Energy: Warning sent to Pruitt from retiring official — Brouillette formally tapped to be DOE deputy — HFC deal backers playing it cool with Trump team — Mike Bloomberg bashes

Trump's coal jobs promise

What is with these people? I say that having been a plain old GS at Treasury for first four years of my career. Under Bush one then Clinton. Most of my coworkers were very liberal but it never, ever impacted their ability or willingness to do their job. This new arrogant bureaucratic class astounds me. Gah. Will call you later. Miss you but met Elizabeth and love her. She stopped in to do paperwork and we laughed our butts off for an hour. Hart 415 is turning into UVA law ghetto. Me, Elizabeth and Harding. Wahoowa. Xo.

Sent from my iPhone

Begin forwarded message:

From: POLITICO Pro Energy <politicoemail@politicopro.com>

Date: April 4, 2017 at 5:45:54 AM EDT **To:** <ian brunner@epw.senate.gov>

Subject: Morning Energy: Warning sent to Pruitt from retiring official — Brouillette formally tapped to be DOE deputy — HFC deal backers playing it cool with Trump team — Mike Bloomberg bashes Trump's coal jobs

promise

Reply-To: POLITICO subscriptions < reply-fe9112747c63067c74-630326 HTML-778659123-1376319-0@politicoemail.com>

By Anthony Adragna | 04/04/2017 05:41 AM EDT

With help from Eric Wolff, Tim Starks and Esther Whieldon

WHAT'S THE FREQUENCY, SCOTT? A retiring veteran climate change specialist has sent EPA Administrator Scott Pruitt a <u>letter</u> warning him of a sea change in agency morale and suggesting he needs to provide better reasons for changing course on policy if he wants the support of the agency's rank-and-file, Pro's Alex Guillén <u>reports</u>. "One of the main purposes of my letter was to really get across to Administrator Pruitt that for him to be successful ... the career staff have to really be a part of that whole thing," Michael Cox told Alex in an interview. Cox also said agency staff were "frankly insulted" by President Donald Trump traveling to the agency to sign an executive order last week rolling back much of EPA's climate change work. "It was beyond comprehension that an administration could be so arrogant and callous," his letter said. For your radar: Pruitt is <u>scheduled to meet</u> with Trump today at 3 p.m. in the Oval Office.

Inhofe 'frustrated': Meanwhile, former Senate Environment and Public Works Chairman <u>Jim Inhofe</u> told ME he was increasingly frustrated by the slow pace of nominating staff to support Pruitt's efforts. "It's not shaping out as well as it should," he said. "They're not there yet where they can be very productive." Inhofe said he had not put forward any suggestions of who should get selected for a variety of political positions at the agency.

BROUILLETTE GETS FORMAL NOD: Trump has formally <u>picked</u> Dan Brouillette as his nominee to be deputy Energy secretary (a decision ME readers <u>learned</u> was on the horizon in mid-February). After leading congressional affairs at DOE under President George W. Bush, Brouillette worked over the past decade at the House Energy and Commerce Committee, Ford Motor Co. and most recently military insurer USAA.

PAGE INTERACTED WITH RUSSIAN AGENT: Former Trump campaign adviser Carter Page met with and passed documents to a Russian intelligence agent he met at an energy conference, according to <u>BuzzFeed News</u>. Page's contact with the operative, Victor Podobnyy, occurred three years before his association with Trump's campaign but is the clearest connection yet between Russian intelligence and someone linked to the president. According to court filings, Page met with, emailed with and "provided documents to [Podobnyy] about the energy business" between January and June 2013. He confirmed the contact but said their interactions did not include anything sensitive.

SIGNED: Trump signed a Congressional Review Act resolution (<u>H.J. Res. 69</u>) late Monday nullifying a Fish & Wildlife Service regulation that barred certain hunting practices such as baiting, trapping and denning animals like wolves and bears in Alaskan national wildlife refuges. It's the fourth successful energy- or environment-related CRA challenge to Obama-era regulations.

WELCOME TO TUESDAY! I'm your host Anthony Adragna, and API's Brian Johnson was first to identify Sen. Chuck Grassley as the holder of the longest current streak of not missing a Senate vote (Sen. Susan Collins has never missed a vote as well). For today: Which U.S. president was born with the surname of Blythe? Send your tips, energy gossip and comments to adragna@politico.com, or follow us on Twitter anthonyAdragna, adragna@politico.com, or follow us on Twitter anthonyAdragna, adragna@politico.com, or follow us on Twitter anthonyAdragna, adragna@politico.com, and apolitico.com, or follow us on Twitter anthonyAdragna, amanagna, amanagna, amanagna, amanagna, amana

PAY ATTENTION: As Congress prepares for battle over government funding, it's <u>worth remembering</u> the fight over retired coal miners' health and pension benefits that nearly caused a shutdown in December. Sen. <u>Sherrod Brown</u> tweeted Monday he'd "<u>fight like hell</u>" to pass legislation shoring up those funds, and the topic also emerged as a <u>major focus</u> during Sen. <u>Joe Manchin</u>'s town hall over the weekend.

BLOOMBERG SCOFFS AT TRUMP'S COAL PROMISE: Former New York City Mayor Mike Bloomberg is decidedly unimpressed with the Trump administration's vow that recent executive action will bring back jobs to the coal industry. "The administration's promise to bring coal jobs back is like promising the people who worked for Eastman Kodak that they're going to get their jobs back," Bloomberg said Monday at "Sustainable Energy for All " forum in New York. "The truth of the matter is that coal is going away not because of anything other than technology and alternative fuel sources. Even to the extent that we still mine coal in this country, it's a handful of people operating a computer and a big shovel comes along and just rips off the top of the mountain."

Early signs 'very worrisome': The former mayor called early actions by Trump in the environmental realm "very worrisome" but also strongly criticized what he called the lack of action on climate change even during the Obama administration. "It's hard to cut back from zero — and zero is overstating it but not by much of what the federal government did," Bloomberg said. "Barack Obama was much more pro-environment, but didn't get any legislation passed and had some executive orders." He called it dependent on the private sector and cities to fuel continued progress in addressing climate change given the lack of engagement from the federal government.

And he retained some hope Trump would come around. "I wouldn't say it's hopeless," Bloomberg said. "Maybe they'll come around and do what I think most people in this room would think is the right thing."

kigali Amendment Backers Playing IT cool: Proposed U.S. budget cuts will hang like a cloud over today's meeting of the Multilateral Fund for the Implementation of the Montreal Protocol in Montreal, an international fund used to help countries adapt to technologies that have helped close the hole in the ozone layer. The U.S. contributes around \$30 million to the fund, but that money is at risk of disappearing under a Trump administration, according to Kevin Fay, executive director of the Alliance for Responsible Atmospheric Policy, a trade group that works on policy issues affecting fluorocarbon-based technologies. Killing the funding would send a worrisome signal to the world not just on the current status of the agreement, but also for ratification of an amendment to the protocol agreed to in Kigali, Rwanda, that would cut down emissions of hydrofluorocarbons, a coolant with high global warming potential. "Now's not the time to exit the stage," Fay told ME. "This is as much an economic success story as an environmental one."

Waiting for the Trump train to roll in: Fay said his organization is seeking a meeting with Office of Management and Budget to make the case that the U.S. contribution to the fund only helps promote U.S.-made coolants, and he expects to meet with EPA officials later this month. But like many organizations in D.C., Fay's group is waiting to for the Trump administration to staff up the agencies,

particularly at EPA's Office of Air and Radiation. "We have good stories to tell," Fay said.

Still laying low: Fay said supporters of the Kigali Amendment worry that the Trump administration, which has been anti-climate science and anti-multilateral treaties, will want to pull out of the deal if they are forced to act on it quickly. Instead Kigali backers will pursue budget issues first, and continue to pursue their strategy of keeping ratification on the back burner while educating the administration and key lawmakers. "Congress isn't ready, the administration isn't ready," Fay said, "but we will be ready when they are."

FROM THE LOCAL BUREAU: Former GOP presidential candidate Mitt Romney will headline a fundraiser in May benefiting the official foundation of Yellowstone National Park at a trendy U Street corridor spot, McClatchy reports.

AGs TO PRUITT: RECONSIDER METHANE ACTIONS: Eight states and Washington DC sent Pruitt a letter Monday urging him to reconsider a March decision to withdraw an Obama-era information request that required oil and gas companies to provide information on methane emissions at their operations. "You unilaterally withdrew the Final Methane [information collection request] on March 2 with no meaningful explanation, let alone a reasoned one," they wrote. The attorneys general, led by Massachusetts' Maura Healey, said EPA is "required" to regulate methane emissions from existing oil and gas facilities and asked Pruitt to explain how the agency "intends to fulfill its legal obligation."

PROGRESSIVES WANT TO DUMP SENATE MODERATES: An array of progressive groups on Monday called on the DSCC to abandon their support for any Democrat who is supporting Neil Gorsuch's Supreme Court nomination — namely Indiana's <u>Joe Donnelly</u>, North Dakota's <u>Heidi Heitkamp</u> and West Virginia's <u>Joe Manchin</u>. "We very much expect the DSCC to have use the leverage that they have to protect the millions of people around the country who are relying on Democrats to do the right thing," said Shaunna Thomas, the founder of ULTRAViolet Action. POLITICO's Kevin Robillard has more.

MORE CYBERSECURITY FOCUS: The Senate Energy and Natural Resources Committee meets today at 10 a.m. to hear about cyber threats to nation's energy delivery system from experts at the Energy Department and in the private sector. The hearing is expected to go beyond the usual focus on just the electricity grid and into the security of natural gas pipelines. Overall, the panel is likely to center the hearing on what the federal government can do to aid industry. One witness snippet: Dave McCurdy, president and CEO of the American Gas Association, will praise his organization's collaboration with the Energy and Homeland Security departments, adding, "We need to maintain our existing security partnerships."

BROWNFIELDS REAUTHORIZATION MULLED: The House Energy and Commerce Subcommittee on Environment meets today at 10 a.m. to consider a discussion draft reauthorizing EPA's popular brownfields program, which helps clean up industrial sites for redevelopment. Provisions in the draft bill would allow EPA to award larger grants, expand eligibility requirements and require the agency to factor in the possibility of renewable energy production on a site into the grant consideration process, among other changes. Witnesses will testify on

behalf of the Environmental Council of the States, National League of Cities, U.S. Conference of Mayors, Smart Growth America's Leadership Institute and the Association of State and Territorial Solid Waste Management Officials.

SENATORS SEEK ASSURANCES ON WATER PLANS: Eleven Senate Democrats, led by <u>Brian Schatz</u> and <u>Ben Cardin</u> — asked Pruitt in <u>a letter</u> Monday to explain how the EPA would meet its mission of protecting clean water if it implements Trump's executive order rolling back Waters of the U.S. "We are concerned that revising or revoking this rule will only increase uncertainty amongst farmers, developers, and other stakeholders that want clarity about what water bodies the law protects from pollution," they wrote.

TAKE A GLANCE: GREENS TOUT RETURNS ON RENEWABLE TAX CREDITS: The Natural Resources Defense Council released <u>an analysis</u> Monday finding the congressional extension of federal wind and solar tax credits will create more than 220,000 jobs and add almost \$23 billion to the U.S. economy in 2017.

REPORT: CONSERVATION PROGRESS AT RISK: The Center for American Progress will release <u>a report</u> today warning conservation investments are at risk due to early Trump administration actions, potentially putting "gains in economic productivity and environmental quality at risk." It concludes that "without a solid foundation of policies that provide regulatory certainty and reduce risk for individuals and companies to invest in projects, the fast-growing conservation investment industry may stall out."

IG FINDS PROBLEMS WITH COAL CLEANUPS: The Interior's Inspector General has <u>found</u> the agency's Office of Surface Mining Reclamation and Enforcement does not adequately track how states are using abandoned mine land grants to reclaim land at abandoned sites nor is it ensuring that they use the money for actual reclamation work. OSMRE agreed to update its program and state grant tracking but said much of it would take at least three years to fully implement.

BOEM SCHEDULES MEETING ON FUTURE OF OFFSHORE WIND:

The Bureau of Ocean Energy Management has scheduled an April 19 public listening session in Annapolis on what next steps it should take on offshore wind. The agency has nearly wrapped up the prior administration's plans for a series of leases in the Atlantic Ocean and is seeking suggestions on next steps. The event will be held 12-1:30 p.m. at the Westin Annapolis Hotel.

ACTIVISTS TAKE EPA FIGHT TO MANHATTAN! Led by Food & Water Watch, activists will today rally today at 12 p.m. at Senate Minority Leader Chuck Schumer's office in Manhattan in hopes of pushing the Senate's top Democrat to defend EPA's funding and mission from threatened cuts by the Trump administration. That comes as the agency's top union, AFGE Council 238, condemned the sought 31 percent funding cuts in a statement: "This budget for the U.S. EPA does not provide for the general welfare, but rather threatens the lives and dignity of all Americans, particularly the most vulnerable in our society," it said.

MOVER, SHAKER: Michael Paules has been named new associate director for the Colorado Petroleum Council, the American Petroleum Institute's division in Colorado.

QUICK HITS

- Pregnancies in 4 N.J. counties affected by pollution, study concludes. NJ.com.
- Coal Plants Near Retirement Age as EPA Reviews Emissions Rules. <u>Morning</u> Consult.
- 'Devastating' coral loss in South China Sea scientists. BBC.
- Flint tells EPA it's not ready to finalize future water sources. MLive.com.
- FedEx CEO Backed by Generals Tries to Nudge Trump on Fuel Rules. Bloomberg.

HAPPENING TODAY

10:00 a.m. — "<u>Discussion Draft: Brownfields Reauthorization</u>," House Energy and Commerce's environment subcommittee, 2123 Rayburn

10:00 a.m. — Legislative <u>hearing</u> on H.R. 220, H.R. 1411 and Discussion Draft of the "Bureau of Reclamation Pumped Storage Hydropower Development Act," House Natural Resources Subcommittee on water, power and oceans, 1324 Longworth

10:00 a.m. — Senate Energy and Natural Resources <u>hearing</u> on cybersecurity threats, 366 Dirksen

12:00 p.m. — "Non-Electric Applications of Nuclear Power," Global America Business Institute, 1001 Connecticut Avenue NW, Suite 230

2:30 p.m. — Senate Appropriations Committee <u>hearing</u> on national water hazards, Senate Appropriations' commerce, justice, science, and related agencies subcommittee, 192 Dirksen

3:00 p.m. — "Everything You Treasure — For a World Free from Nuclear Weapons," Soka Gakkai International-USA, 2226 Rayburn

THAT'S ALL FOR ME!

To view online:

https://www.politicopro.com/tipsheets/morning-energy/2017/04/warning-sent-to-pruitt-from-retiring-official-022174

Stories from POLITICO Pro

Retiring EPA specialist warns Pruitt about alienating agency staff Back

By Alex Guillén | 04/03/2017 07:35 PM EDT

A veteran climate change specialist is departing EPA with a warning for Administrator Scott Pruitt: You're failing the agency's roster of career staffers and experts.

"My judgment is Administrator Pruitt has not done a very good job in terms of the EPA career staff up to this point," Michael Cox told POLITICO in an interview.

Having worked for administrations dating back to the Reagan era, Cox said there has been a sea change in morale among EPA's workforce since President Donald Trump's election and Pruitt's arrival.

Cox, who retired Friday as a climate change specialist in EPA's Seattle office after 25 years at the agency, sent a <u>letter</u> to Pruitt laying out the fears that staffers were having.

"I felt strongly I wanted to put something on paper, not in a negative sense, but hopefully in a positive sense, that he could understand a little bit better some of the uncomfortableness some of the staff at EPA are feeling," he said.

Cox's four-page letter lists several issues he says are driving down morale, ranging from controversies like Pruitt's questioning of climate change science to "indefensible" budget cuts that would slash the agency's workforce by 21 percent.

"We understand that our positions may not always prevail, but please take the time to listen to expert voices that might differ from yours and your immediate staff," Cox wrote. "You may be surprised that you can find common ground on many issues."

The letter also touches on what he calls a lack of understanding of EPA's mission and "false hope" the administration is giving to coal miners about their jobs returning, as well as complaints that Pruitt's political staffers having long histories of criticizing EPA — in particular those that are former aides to Sen. Jim Inhofe, like Pruitt's chief of staff, Ryan Jackson.

While no surprise, Trump's energy executive order rolling back Obama administration climate change regulations last week "didn't sit real well" because of how it was touted to EPA workers, Cox said.

"We were frankly insulted that the president would come to EPA to announce that he is overturning the work to battle the most urgent environmental problem of our generation — climate change," he wrote in his letter. "It was beyond comprehension that an administration could be so arrogant and callous."

EPA declined to comment on the letter.

Cox said he had decided to retire before last year's election, and stressed that he is not leaving as a "disgruntled" employee.

He first started at EPA in 1987 reviewing state hazardous waste plans and spent several intervening years working for the city of Seattle as well as with UNICEF in West Africa.

"One of the main purposes of my letter was to really get across to Administrator Pruitt that for him to be successful ... the career staff have to really be a part of that whole thing," he said.

Pruitt can change course on policy, Cox added, but he needs to provide better reasons for doing so if he wants the support of the agency's rank-and-file.

"There has to be analysis showing why this is a better approach, not just saying it's a better approach," Cox said. "EPA staff will respond if there's some logic, some analysis and some evaluation and science that's behind it."

Cox isn't the first longtime EPA employee to air public grievances upon leaving the agency since Trump took office.

Mustafa Ali, a 24-year EPA official who ran the department's environmental justice program, <u>resigned</u> last month after issuing <u>his own letter</u> to Pruitt urging him not to slash the budget.

"My values and priorities seem to be different than our current leadership and because of that I feel that it's best if I take my talents elsewhere," Ali said at the time. He has since taken a job with the nonprofit Hip Hop Caucus.

The White House has since proposed <u>eliminating</u> the environmental justice program Ali had run, saving almost \$2 million, "as part of the effort to limit federal investment in activities that go beyond the EPA's core statutory requirements and to focus agency resources on its highest national priorities."

Back

Trump picks Brouillette for DOE's No. 2 spot Back

By Alex Guillén | 04/03/2017 07:42 PM EDT

The White House announced tonight that President Donald Trump will nominate Dan Brouillette to be deputy Energy secretary.

POLITICO <u>reported</u> in February that Brouillette was expected to be named to the Energy Department's number-two slot.

Brouillette formerly led congressional affairs at DOE under President George W. Bush, for which he was confirmed by a voice vote in 2001.

For the last decade, he has spent time at the House Energy and Commerce Committee, Ford Motor Co. and most recently military insurer USAA, where he is a senior vice president in charge of policy. He also served on the Louisiana State Mineral and Energy Board from 2013 through last year.

Sources: Brouillette slated to be DOE No. 2 Back

By Darius Dixon | 02/15/2017 06:33 PM EDT

Dan Brouillette, who led DOE's congressional affairs office early in President George W. Bush's administration, is expected to be tapped for deputy Energy secretary, according to several sources close to the process.

After his stint at DOE, Brouillette worked stints with the House Energy and Commerce Committee and Ford Motor Co. before joining USAA in 2006 to lead the financial service company's government and industry relations shop in Texas.

Rick Dearborn, who followed Brouillette in the role of DOE's assistant secretary for congressional and intergovernmental affairs, is now a deputy chief of staff in the Trump White House.

The Trump administration has generally held off from announcing Cabinet deputies until the agency leader is confirmed by the Senate. Energy secretary nominee Rick Perry has not yet gotten a vote from the full Senate.

The sources also said Brouillette won't get official signoff until he gets through the standard ethics review and FBI background checks.

The White House didn't respond to a request for comment.

Back

Why a fight over coal miners could shut down the government <u>Back</u>

By Marianne LeVine | 12/09/2016 09:04 AM EDT

A fight over a spending-bill provision to prevent thousands of retired coal miners from losing their health benefits could shut down the federal government if lawmakers don't reach an agreement Friday.

The issue's been simmering all year as the United Mine Workers' multiemployer health and pension plans verge on insolvency due to coal company bankruptcies and the 2007-08 financial crisis.

Coal country Democrats including West Virginia Sen. <u>Joe Manchin</u> (D.-W.Va.) have been pushing legislation since 2015 to shore up the United Mine Workers' health and pension plans. But some Republicans have labeled the plan a bailout.

Now, there's a more immediate crisis, as 12,500 retirees and their dependents from bankrupt Patriot Coal face losing their benefits on Dec. 31. Another 3,600 from a separate plan will also be cut off by Jan. 1. The continuing resolution that Congress is considering would fund health benefits for them through April 28. But Manchin and other coal country Democrats say they'll oppose the must-pass spending bill unless it contains a longer extension of the benefits.

Senate Majority Leader Mitch McConnell said Tuesday that he "insisted" that the CR include the UMW provision to ensure that retired miners "don't lose their health benefits at the end of the year." But according to a <u>preliminary Congressional Budget Office score</u>, the money won't come from Treasury; rather, it will come from shifting funds from the retirees' multiemployer health plan.

It isn't entirely clear that Congress is acting within its powers. In a statement, trustees to the multiemployer health plan said Congress "does not ... have the authority to appropriate private funds from one group of retirees to benefit a different population" and that "to do so would violate the due process rights of adversely affected retirees and would constitute an unconstitutional taking in violation of the Fifth Amendment."

There could be bigger problems down the line. UMWA President Cecil Roberts warned the Senate Finance Committee earlier this year some actuaries predict the union's multiemployer pension plan would go insolvent by 2020. That would put the plan at the doorstep of the Pension Benefit Guaranty Corporation, the federal government's pension insurer. But the PBGC's multiemployer pension program is also projected to go insolvent by the end of 2025.

Manchin has proposed bipartisan <u>legislation</u> to shore up the Mine Workers' health and pension plans using money from the Abandoned Mine Reclamation Fund and the U.S. Treasury. Money from these two sources is already used to pay for some retiree health benefits but not for the benefits of so-called orphan retirees, or retirees who worked for coal companies that went bankrupt. None of the money may be used to pay for pension benefits, under current law.

Opponents to the bill say it's a government bailout and sets a precedent for other financially troubled multiemployer pension plans. But proponents argue that the money to pay for the benefits is already set aside for related purposes and that spending it would not increase the federal deficit.

Lawmakers tried last year to attach the legislation to the omnibus spending bill. But McConnell <u>reportedly</u> blocked that effort and said the bill needed to go through regular order.

The Senate Finance Committee approved Manchin's bill in September.

Proponents, including Sens. Manchin, <u>Shelley Moore Capito</u> (R-W.Va.) and Sherrod Brown (D-Ohio), say the continuing resolution is not enough.

In a <u>statement</u> upon the CR's release, Capito said that she was "disappointed that the full Miners Protection Act ... was not included in the continuing resolution." She added that "while the short-term, four-month patch will prevent our miners from losing their health care benefits in just a few weeks, we have more work to do."

Back

Progressive groups urge DSCC to cut off Gorsuch supporters Back

By Kevin Robillard | 04/03/2017 03:54 PM EDT

A cadre of progressive groups — including Our Revolution, the political nonprofit that grew out of Sen. <u>Bernie Sanders'</u> presidential campaign — are pressuring the DSCC to cut off funds for three vulnerable red-state senators who announced they will support Judge Neil Gorsuch for the Supreme Court.

More than 230,000 activists signed petitions asking the DSCC to abandon their support for any Democrat who is supporting Gorsuch. Three senators up for reelection in 2018 — Indiana's <u>Joe Donnelly</u>, North Dakota's <u>Heidi Heitkamp</u> and West Virginia's <u>Joe Manchin</u> — have all said they will support President Donald Trump's first Supreme Court nominee.

The groups held a press conference outside of the DSCC and tried unsuccessfully to meet with DSCC executive director Mindy Myers.

"We very much expect the DSCC to have use the leverage that they have to protect the millions of people around the country who are relying on Democrats to do the right thing," said Shaunna Thomas, the founder of ULTRAViolet Action. "The DSCC is in an unique position to withhold funding from people" who would vote for Gorsuch.

While Democrats' progressive base is demanding resistance to Trump and newfound energy is empowering groups on the left to push establishment Democratic organizations, the petitions are highly unlikely to influence the DSCC, which has always existed to defend Democratic incumbents regardless of ideology. The DSCC declined to comment.

The activists noted the DSCC had fundraised aggressively off Senate Minority Leader <u>Chuck Schumer</u>'s decision to filibuster Gorsuch's nomination, and said they would be misleading their base if they proceeded to use small-donor cash to back Heitkamp, Manchin and Donnelly.

"At the very least, this would be a breach of trust for the small donors who fund the DSCC," said Kurt Walters, the campaign director at Demand Progress.

Ten liberal groups — CREDO, #AllofUs, Center for Popular Democracy Action, Demand Progress, Friends of the Earth Action, Our Revolution, Presente Action, Social Security Works, UltraViolet Action and #VOTEPROCHOICE — worked together to gather the signatures. Other Democratic groups, including the abortion-rights group NARAL Pro-Choice America, have also declared they won't support senators who back Gorsuch.

Establishment Democrats have been largely dismissive of progressive calls for primary challenges to moderates like Manchin, Donnelly and Heitkamp, noting those senators are likely to understand the voters in West Virginia, Indiana and North Dakota better than activists elsewhere.

The progressives say that is a grave mistake.

"They dismiss the dissatisfaction of the grassroots at their own peril," said Claire Sandberg, the co-founder of #AllofUs, which recently launched a campaign to primary moderate Democrats. "Democrats need to give voters something to vote for, not Trump lite. It doesn't make any sense, when Trump has a 35 percent

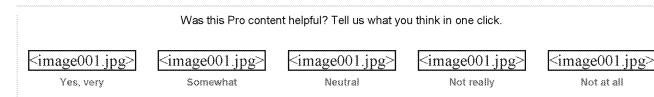
approval rating, for Democrats to cozy up to him rather than standing for a different set of values."

Our Revolution, which is run by former Sanders campaign manager Jeff Weaver and works to further the Vermont senator's political agenda, didn't send a speaker to the press conference, but it gathered signatures for the effort. Sanders, an independent who caucuses with Democrats, has raised money for the DSCC in the past.

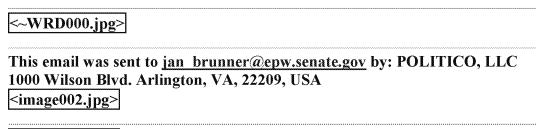
Weaver didn't respond to repeated requests for comment.

Gabriel Debenedetti contributed to this report.

Back



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From: Gunasekara, Surya [Surya@mail.house.gov]

Sent: 4/11/2017 2:37:49 AM

To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Jackson, Ryan

[/o=ExchangeLabs/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=38bc8e18791a47d88a279db2fec8bd60-Jackson, Ry]

Subject: Fwd: President Donald J. Trump Announces Intent to Nominate Donald M. Benton to the United States Selective

Service System

Soft landing for the Senator.

Surya G. Gunasekara Chief of Staff

Congressman Renacci (OH-16)

Sent from my iPhone

Begin forwarded message:

From: White House Press Office <whitehouse-noreply@useopwh.service.govdelivery.com>

Date: April 10, 2017 at 10:19:24 PM EDT

To: <surya@mail.house.gov>

Subject: President Donald J. Trump Announces Intent to Nominate Donald M. Benton to the United

States Selective Service System

Reply-To: <whitehouse-noreply@useopwh.service.govdelivery.com>

THE WHITE HOUSE Office of the Press Secretary

FOR IMMEDIATE RELEASE April 10, 2017

President Donald J. Trump Announces Intent to Nominate Donald M. Benton to the United States Selective Service System

President Donald J. Trump today announced his intent to nominate Donald M. Benton to the United States Selective Service System.

If confirmed, Donald M. Benton of Washington will serve as the Director of the United States Selective Service System. Mr. Benton served as a Senator in the Washington State legislature for 20 years from 1997 to 2017. He earlier served two terms as an elected college trustee on the Santa Clarita Community College District Board of Trustees and one term in the Washington State House of Representatives. Mr. Benton started his first company when he was 17 years old, and has built and sold several companies since.

Mr. Benton served as the Director of the Clark County Environmental Services Department from 2013 to 2016. During his tenure he reduced the cost of removing hazardous waste from the waste stream while doubling citizen participation and tripling the tonnage of hazardous waste removed. Mr. Benton was also responsible for Clark County certifying more Green Schools than in any other county in Washington State.

Mr. Benton also served as the White House Senior Advisor to the EPA during transition.
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BRUSSELS, BELGIUM

March 31, 2017

BY REGULATIONS.GOV

U.S. Department of Commerce Office of Policy and Strategic Planning H.C. Hoover Building, Room 5863 1401 Constitution Avenue, N.W. Washington, DC 20230

Re: Response to Request for Information: Impact of Federal Regulation on Domestic Manufacturing (82 Fed. Reg. 12,787 (March 7, 2017)

To the U.S. Department of Commerce:

The Steel Manufacturers Association ("SMA") and the Specialty Steel Industry of North America ("SSINA") (collectively, "the Steel Associations") are pleased to provide this response to the U.S. Department of Commerce's ("Commerce Department") Request for Information on the Impact of Federal Regulations on Domestic Manufacturing.¹

SMA is the largest steel trade association in North America, in terms of membership, and the primary trade association of electric arc furnace ("EAF") steel producers, often referred to as "minimills," that make various steel products, including carbon, alloy, and stainless steels, from a feedstock of nearly 100 percent steel scrap. The member companies of the SMA are geographically dispersed across the country and account for over seventy-five percent of total domestic steelmaking capacity.

SSINA is a national trade association comprised of producers of specialty steel products, including stainless, electric, tool, magnetic, and other alloy steels. SSINA members account for over ninety percent of the specialty steel manufactured in the United States. SMA and SSINA are proud to

¹ 82 Fed. Reg. 12,787 (March 7, 2017).

represent an industry that directly employ over 150,000 people and indirectly supports over one million jobs in supporting industries.

The Steel Associations appreciate this Administration's interest in understanding the regulatory burdens facing domestic manufacturing. The domestic steel industry is among the most heavily regulated industries in the world. Some of the industry's best and brightest engineering minds and substantial resources are directed at ensuring that emissions from steel facilities do not pollute the nation's air, waterways, and natural resources. Compliance with environmental regulations is a core value of SMA, SSINA, and their members. These efforts, however, come with costs that hinder our competitiveness with foreign manufacturers, particularly those from China, India, and other developing countries that either lack comparable regulations or enforce their regulations less aggressively than the United States.

While some regulations are relatively costly, it is the cumulative impact of all the environmental, health and safety regulations that result in a heavy burden on U.S. producers of carbon, stainless and specialty steel. Taken as a whole, the numerous environmental programs under the Clean Air Act ("CAA"), Clean Water Act ("CWA"), Resource Conservation and Recovery Act ("RCRA"), Environmental Planning and Community Right-to-Know Act ("EPCRA"), and the Toxic Substances Control Act ("TSCA"), among others, require extensive capital and operational expenditures to maintain compliance. Regulatory authorities, at both the state and federal levels, regularly inspect steel facilities and aggressively enforce these regulations.

SMA and SSINA members are proud of the products they manufacture and to produce them in a safe and environmentally responsible manner. While the regulatory burdens on our industry are abundant and onerous, the Steel Associations are not seeking radical deregulation. Instead, the Steel Associations herein aim to identify those federal regulations and requirements that impose burdens without delivering concordant environmental, health, and safety benefits.

The regulatory burdens identified in this response are the product of initial conversations with the Steel Associations' members, and should not be considered comprehensive. To that end, we ask that this letter serve as a request to establish a dialogue with the Administration and the Commerce Department on the burdens associated with federal regulations and ways to ease regulatory burdens while continuing to protect the environment, our workers, and American jobs.

I. Profile of the Domestic Steel Industry

The steel industry is a tremendously beneficial part of the North American economy. EAF mill operations use high temperature furnaces to melt recycled steel scrap and produce new steel products—over 90 percent of the material input is recycled scrap. Last year, the entire U.S. steel industry recycled roughly 70 million tons of scrap, 80 percent of which was consumed in EAFs. Recycling scrap steel conserves energy, reduces the burden on landfills, and prevents the accumulation of abandoned steel products. Similarly, stainless steel is 100% recyclable and its corrosion resistance, durability, and long service life help reduce resource use and make it an ideal material for sustainable design and in a wide range of applications, including national defense, aerospace, energy production, water infrastructure, food processing, and medical equipment.

Given the environmental benefits provided by the domestic EAF industry, regulatory and policy decisions that help our industry also help the environment.

Notwithstanding these benefits, in recent years, the domestic steel industry has faced significant economic challenges based, in large part, on unfair trade practices, costly domestic regulations, and increased international competition. According to year-end import data for 2016, foreign steel imports accounted for 26% of the domestic steel market. The resulting impact on domestic steel manufacturers has been profound. The domestic steel industry is now operating at only 70.8% capacity have been forced to lay off over 14,400 employees. The International Trade Commission ("ITC") recently determined that the U.S. steel industry is materially injured by imports of Chinese cold-rolled flat steel product² and stainless steel sheet and strip³. Examinations of the U.S. stainless steel wire rod industry have shown "a pattern of consistent declines in gross profit" and declines in sales quantity.⁴

II. Responses to Specific Questions

a. <u>Manufacturing Permitting Process</u>

1. How many permits from a Federal agency are required to build, expand or operate your manufacturing facilities? Which Federal agencies require permits and how long does it take to obtain them?

The number of permits required at steel mills can vary significantly from mill to mill, but in all cases, permitting requirements are numerous and quite onerous. One mill reported to SMA that it was required to obtain at least a dozen different permits over four years in order to upgrade and expand its operations.⁵ In addition to the number of permits required for this expansion, EPA added to the burden by requiring operational specifications for equipment that would not be evaluated and purchased until later stages of the project. The Agency's demand for these specifications was not based on any law or regulation. Instead, it was an extra burden imposed by EPA's own internal guidance. These additional non-regulatory permit requirements increased costs and delayed a project that promised to deliver new jobs when they were sorely needed – while providing no increased environmental protection or benefit.

² See 81 Fed. Reg. 45,960 (July 14, 2016).

³ Stainless Steel Sheet and Strip from China, Inv. Nos. 701-TA-557, 731-TA-1312, USITC Pub. 4603 (April 2016) (Preliminary).

⁴ Stainless Steel Wire Rod from Italy, Japan, Korea, Spain, and Taiwan, Inv. Nos. 731-TA-770-773 and 775 (Third Review), III-16, III-19 (May 2, 2016) (Prehearing Staff Report).

⁵ The major permits identified included: (1) Air - construction for Blast furnace, (2) Air - construction for DRI furnace, (3) Air - operation for Blast furnace, (4) Air - operation for DRI furnace, (5) Stormwater Construction, (6) Water discharge, (7) Water intake, (8) Barge Fleeting, (9) Dock and conveyor structure, (10) Archeology preservation, (11) Wetlands mitigation, (12) Federal Aviation Administration permit for tall structure.

In addition to the deluge of permitting requirements steel mills face during construction, and even for relatively modest expansions, steel mills require permits for their continued operation. Federal environmental laws and regulations generally require steel mills to have permits for air emissions, discharges to offsite waters or treatment facilities, stormwater runoff, and for the generation, storage, and handling of solid and hazardous waste. Many mills can incur additional permitting requirements based on the type and volume of chemicals stored or used on the facility, the presence of wetlands on the property, and even the type of steel being manufactured.

Steel mills also may have different permitting requirements depending on the age of the facility and equipment. In particular, mills frequently trigger more stringent regulations and permitting requirements during construction, when expanding capacity, and even when installing environmental controls or more energy efficient processes.

Importantly, EPA is not the sole source of a steel mill's permitting requirements – even those permits focused on environmental matters. Steel mills are required to obtain and comply with increasingly burdensome Department of Transportation permits for shipping hazardous waste for reclamation, and can require additional permits from the U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, and National Marine Fisheries Service depending on the presence of waterways, wetlands, or endangered species at or near the facility.

Steel mills may be subject to increased permitting requirements based on where they are located. State regulations clearly contribute to some of this variability, but even federal environmental laws and regulations mandate different permitting requirements based on the mill's presence in an area that does not meet one or more of six CAA National Ambient Air Quality Standards ("NAAQS") for criteria pollutants or which contributes to nonattainment in another area of the country.

The determination of whether a single stationary source, like a steel mill, causes or contributes to nonattainment with a NAAQS is difficult, if not impossible to assess. Notwithstanding the limitations on modeling the dispersion and contribution of emissions, EPA routinely pushes air dispersion models well beyond their inherent limitations and uses them to make increasingly speculative determinations about the contributions of, and need for more stringent limits at, individual facilities like steel mills.

To complicate matters further, EPA continues to increase the stringency of the NAAQS, even before attainment plans are fully implemented to achieve earlier versions of the standards. While the CAA clearly envisioned a program that allowed NAAQS stringency to increase or decrease, EPA has only made NAAQS more stringent. In the case of ozone, EPA in 2015 lowered the NAAQS to levels at, or near, levels at which ground level ozone naturally occurs. The results of this ceaseless tightening of standards are exponentially increased compliance costs and a constantly shifting playing field, while achieving significantly diminished environmental returns.

Clearly, steel mills are subject to a number of different permitting and regulatory requirements, but simply listing the number of permits does not adequately capture the full burden and complexity of federal environmental permitting. Consider, for example, permitting under the

CAA. States are generally the primary permitting authorities although they are required to issue permits meeting federal requirements, and must allow federal EPA to review and approve permitting decisions. Federal EPA can, and often does, bring enforcement actions under the state-issued permit.

While a steel mill operates under a single air permit, that permit easily can exceed 100 pages and contain dozens of very specific control, monitoring, record-keeping and reporting requirements for each of the multiple emissions sources at a steel mill. Many facilities have dozens of sources, including the EAF, reheat furnaces, ladle pre-heaters, process heaters, industrial boilers, and generators — even unpaved roads and material storage areas are considered emission sources because they may result in dust in windy conditions and, therefore, must be included in a permit and controlled.

In short, a steel mill's CAA permit is an aggregation of dozens of compliance requirements and recordkeeping/reporting obligations that are both costly and time-consuming.

The inevitable result of this regulatory backdrop has been a decreased ability for domestic facilities to compete internationally and the loss of market share to foreign competitors which face little or no environmental controls.

2. Do any of the Federal permits overlap with (or duplicate) other federal permits or those required by State or local agencies? If the answer is yes, how many permits? From which Federal agencies?

With few exceptions, EPA largely delegates environmental permitting to the states. While the state is typically the primary permitting authority for a steel mill, federal EPA retains authority to review permits, review the state's permitting process, and interpret and enforce compliance with permit conditions. While EPA has always retained this oversight authority, in recent years, federal EPA has ceded less discretion to states and taken a much more aggressive posture toward steel mills – particular in EPA Region V.

Over the past few years, Region V has implemented a vigorous enforcement program targeting EAF steel mills. Nearly all of the mills in Region V have been inspected in the past three years. Many of those mills also have received Information Collection Requests ("ICRs") under CAA Section 114. In some cases, those inspections and/or ICRs have identified legitimate compliance issues which have resulted in enforcement actions. The Steel Associations have no objection to using enforcement authority when legitimate compliance issues exist. Some of the mills, however, have received enforcement notices based upon highly questionable interpretations of the CAA and/or facility permit language. The mills have been unsuccessful in their attempts to address these issues with Region V.

Specifically, there are two policy issues that are of concern to the Steel Associations and their members. The first relates to the use of the CAA General Duty Clause.⁶ In some cases, regional enforcement personnel have required mills, in response to an ICR, to produce copies of voluntary engineering studies or vendor-conducted studies that have been conducted by or at the mill. Often, these studies are conducted to evaluate new processes or equipment. In some cases, the vendorsponsored studies are conducted as part of a marketing effort independent of the steel mill. These studies are not required by the CAA or the facility's permits, but instead may be used to support decisions to upgrade equipment or improve operations. Recommendations from the studies are evaluated internally for feasibility and, if approved, may then go through the permitting process. Study results intended to increase efficiency may or may not be implemented depending on a number of factors, including permitting implications and cost. Even though the studies are not compliance related, in at least three instances of which we are aware, EPA enforcement officials have found that the failure to implement the recommendations of such studies constitutes the "failure to maintain good air pollution control practices" despite the absence of any specific related emissions violations. As a result, mills are reluctant to conduct studies knowing that the recommendations may become de facto enforceable requirements. This chilling of innovation is not good for the industry or the environment.

Second, many of the mills have permit language that generally requires particulate emissions to be controlled by baghouses. Typically, the permit language requires the mill to control the emissions "at all times that the unit is in operation." In some cases, the permit background documents contain estimates regarding the control efficiency of the baghouse or the capture efficiency of the canopy hoods. The permits all contain the requirements of the New Source Performance Standards ("NSPS") and the National Emission Standards for Hazardous Air Pollutants ("NESHAP") applicable to the individual mill. Those requirements include limitations on particulate emissions from the baghouse and the opacity of emissions from the melt shop. In several recent instances, Region V inspectors are taking the novel position that the requirement to "control emissions" applies at the point of generation (*i.e.*, inside the meltshop), and that failure to achieve 100% capture and control at that internal point is therefore a violation of the permit, even when there is no correlating indication of a violation of the emission limits or opacity standards outside of the meltshop building.

There is no steel mill in the U.S. that "captures and controls" 100% of all particulate emissions from the furnaces inside the meltshop. EPA Region V's interpretation of the standard is in direct conflict with how the NSPS standards, and corresponding permit limits, were developed and the entire purpose of preventing emissions releases to the external environment. However, the threat of enforcement is being used to force mills to conduct expensive ventilation studies that may, in turn, be used to create enforceable obligations under the General Duty clause – all with no reduction in actual emissions to the environment.

3. Briefly describe the most onerous part of your permitting process.

⁶ 40 C.F.R. section 60.11(d).

• The Steel Associations' members identified delay, cost, and uncertainty as the three most onerous parts of the permitting process. Based on individual member responses, it is clear these burdens are interrelated. Delay, for instance, is a source of increased costs and uncertainty, while uncertainty about permit requirements or EPA's data demands can lead to delays and increased costs. Delay - For those processes emitting regulated pollutants, a construction permit is required each time a new process is installed, and each time an existing process is modified. The construction permitting process, however, can be extremely protracted (even for minor modifications), and can impede a steel mill's ability to be responsive to the needs of their customers. For larger projects that must undergo major New Source Review, it has become extremely difficult to satisfy the NAAQS requirements during the permitting process. These standards (especially for NO_x, Ozone, and PM_{2.5}) have become so unreasonably stringent that it has virtually prohibited new large construction projects.

Where projects can proceed, they often do so glacially. For example, it is not uncommon for it to take over three years to obtain a new air permit, during which there often may be several public hearings and several rounds of application reviews across multiple EPA offices.

Another member explained that the EPA and state environmental agencies are not the sole source of environmental permitting delay. Construction projects or modifications that may have impacts on wetlands or other waterbodies can often require permits from the U.S. Army Corps of Engineers ("USACE"). The USACE permitting process in some instances may require several rounds of review, multiple submissions, and over three years to complete.

Cost – Steel mills understand that there are costs associated with permitting and with operating an industrial facility. The EAF steel industry is not adverse to spending money on technology where it is necessary and appropriate for the protection of human health and the environment. However, the steadily rising costs associated with the ever-increasing complexity of the permitting process is of deep concern to the steel industry. For even simple modifications or capacity increase projects, permitting authorities often impose complex data requirements and technical analyses. As a result, steel mills are required to hire consultants and lawyers to populate and process the permit application. These costs, which can easily exceed one million dollars, are then added to the cost of the project, and on occasion, can affect the viability of the project. Most importantly, as many construction and modifications projects at steel mills are designed to improve efficiency, delaying or forestalling the projects undermines, rather than furthers, environmental protection.

Another source of frustration are the costs associated with monitoring, recordkeeping, and reporting requirements – none of which reduce emissions or discharges. As one member explained:

"In past years we dedicated the majority of our environmental resources to emission reduction equipment that has dramatically reduced our impact on the environment. In more recent years, the majority of our environmental resources have been dedicated to monitoring and recordkeeping. Reducing the frequency of monitoring, and reducing the amount of recordkeeping and reporting would be very beneficial. We believe that we can adequately demonstrate ongoing and continuous compliance with reduced levels of monitoring and recordkeeping."

• <u>Uncertainty</u> – Environmental permitting has many sources of uncertainty, including the permitting authority's data needs, timing, procedures, the roles of various agencies in multi-agency review projects, and the data that the permitting authorities use and rely upon in making permitting decisions. Often, this variability is based on the views and expectations of a particular regional office or specific employee or office within EPA. Other times, the requirements can apply Agency-wide, yet still create uncertainty. EPA, for example, is inconsistent in its data demands and the procedures by which it approves projects at steel mills and other stationary sources. According to one member:

"The ever-changing requirements from EPA regarding modeling has been a real issue in permitting efforts. Requiring modeling for more and more trivial sources has added a tremendous burden. As an example, an emergency generator can create delays for major projects."

Where EPA has tried to provide some guidance for purposes of consistency, it has only done so through internal guidance – not through rulemaking procedures. As a result, there is no opportunity to improve the internal guidance through stakeholder engagement and, in fact, because the internal guidance does not go through notice-and-comment rulemaking, permit applicants are often unaware of EPA's expectations.

EPA also has injected uncertainty into the permitting process through its use and reliance on models and model-derived data. During the New Source Review permitting process, EPA requires facilities to demonstrate that they will not adversely impact NAAQS attainment through the use of predictive air dispersion modeling. It has been shown that predictive air dispersion modeling is a highly inaccurate tool and incapable of reasonably measuring the contribution of a single source to ambient pollutant levels. Moreover, even under the best circumstances, these dispersion models are the product of the model inputs, which are highly variable and can often reflect policy views of the model user. These air dispersion models are frequently used in ways that produce highly unreliable results and are known to be imprecise, and yet the product of these models alone can often dictate whether a project or expansion can proceed or not.

4. If you could make one change to the Federal permitting process applicable to your manufacturing business or facilities, what would it be? How could the permitting process be modified to better suit your needs?

The Steel Associations are encouraged that the Administration is soliciting feedback on ways to improve the permitting process, and believe that it may be appropriate to discuss this topic in more detail. Distillation of the steel industry's concerns with the environmental permitting process into a single recommended change would likely obscure the breadth of these concerns, inadequately reflect concerns of particular segments of our industry, and provide the Administration an incomplete picture of our industry's permitting burdens. While the Steel Associations believe that they can assist the Administration by compiling and organizing these industry-wide concerns, such an exercise would require additional dialogue with our members and the Administration. Nonetheless, based on the initial responses of our members, the Steel Associations herein provide several interim suggestions.

- Air Permitting Deadlines Compel EPA to set, and adhere to, reasonable deadlines for
 processing and responding to permit applications. Currently, EPA either declines to make
 a determination or prolongs a decision for so long that projects are left in a regulatory limbo
 or abandoned altogether.
- Transparent Requirements/Procedures When applying for permits, steel mills are quite willing to adhere to application procedures and provide the permitting authorities information relevant to the permit decision. Difficulties arise, however, when EPA does not provide clarity on its procedures and information requirements. These transparency problems are significantly compounded when EPA changes its requirements through Agency-generated guidance without notice to the applicants or the ability to comment on, or ask questions about, the guidance. In many cases, EPA's efforts to change permitting requirements likely have less to do with obtaining information necessary for informed permitting decisions, and more to do with blocking or delaying permits. EPA should be required to establish, through notice-and-comment rulemaking, transparent permitting requirements, and the Agency should be compelled to abide by those requirements.
- <u>Limit Reliance on Modeling</u> During the New Source Review permitting process, it would be beneficial to reduce or eliminate the need to demonstrate compliance with the NAAQS based on predictive air dispersion modeling. It has been shown that predictive air dispersion modeling is a highly inaccurate tool, and yet permits for major capital investments are often granted or not based on speculative use of these models.
 - 5. Are there Federal, State, or local agencies that you have worked with on permitting whose practices should be widely implemented? What is it you like about those practices?

Members of the Steel Associations reported positive experiences with environmental permitting authorities in Indiana, Louisiana, Ohio, and Texas. Generally, the members felt the state permitting authorities were more accessible, more reasonable, and more responsive. The Steel Associations' members also characterized their state regulators as more knowledgeable about EAF steel manufacturing, or more willing to take the time to become knowledgeable about their

facilities. Armed with superior knowledge, state personnel often understand the impracticability or inapplicability of certain controls or requirements, and are more often open to allowing alternate compliance options that reach the same goal through the use of less burdensome means.

In addition to their generally favorable impression of state permitting authorities, members of the Steel Associations identified the following state-specific practices as beneficial and worthy of replication at the federal level:

- The Indiana Department of Environmental Management ("IDEM") was streamlined under former Governor Mitch Daniels, and continued to be improved under former Governor Mike Pence. While IDEM permit engineers require that all applicable requirements are satisfied, they do so in a streamlined and assistive manner that assures timely construction permits are issued that are not unnecessarily burdensome.
- The Texas Department of Environmental Quality takes a common sense approach in which they allow permits by rule for regular or minor operations that prevent the need to obtain a lengthier permit determination. The approach is less costly and time consuming for both the permittee and the permitting authority and further allows the permitting authority to preserve greater resources for processing permits for more significant projects and modifications. Louisiana has a similar expedited permitting process.
- Some states allow for customer feedback on the performance of the permitting process and/or government employees involved in the process. This approach leads to an improved level of service and recognition of those employees that are doing good work. According to one of the Steel Associations' members:

"Recent changes to encourage feedback from the regulated community in one of the states we operate has improved the coordination and cooperation between parties. Most of the feedback that was provided to the state through the survey process has been positive and constructive."

Where the Steel Association members' experienced problems with state permitting authorities, the members often attributed those problems to the federal permitting authorities' involvement in the process. Federal EPA often requires changes to permit language to which the state and permittee have already agreed. EPA also can be quite prescriptive in directing how states run their permitting programs. In fact, EPA recently revoked Texas's authority to issue permits under the CAA over differences in how the permitting process should be run.

b. Regulatory Burden/Compliance

1. Please list the top four regulations that you believe are most burdensome for your manufacturing business. Please identify the agency that issues each one. Specific citation of codes from the Code of Federal Regulations would be appreciated.

Steel mills are regulated under a number of environmental statutes, and because different mills experience different burdens from regulations promulgated under those statutes, the Steel Associations are not able to precisely identify and definitively rank four specific regulations as the "most burdensome." Additionally, because many environmental controls at steel mills are designed to comply with multiple permit limits and regulatory requirements, it can be difficult to attribute the burden of installing and operating that control equipment to a single regulation. In order to be as responsive as possible, we herein identify four *types* of environmental regulations that unduly burden the domestic EAF steel manufacturing industry.

<u>Clean Air Act Regulations</u> – Regulations promulgated pursuant to the CAA, including requirements under the NSPS, NESHAP, and PSD/NSR programs, are undoubtedly the most costly and time-consuming environmental regulations faced by the EAF steel industry. CAA rules mandate the costliest control technology at steel mills, impose the costliest and most labor-intensive monitoring, recordkeeping, and reporting requirements, and generate the most agency inspections and compliance risks.

Air permitting under Title V of the CAA is complex, inefficient, and stifles investment within the U.S., without providing corresponding environmental benefit. As discussed elsewhere in this response, the costs and delays associated with CAA permitting cause many steel mills to opt against upgrades or process improvements. These barriers to growth are compounded by EPA's use of models that are known to over-estimate emissions, impacts, and risks.

While there are costs associated with all regulations promulgated under the CAA, several regulations are particularly onerous – not because they result in the highest compliance costs at steel mills, but because the burdens they impose result in few, if any, environmental benefits. These regulations include, but are not limited to, the following:

- Standards of Performance for Stationary Compression Ignition Internal Combustion Engines (RICE) – 40 CFR 60 Subpart IIII;
- Standards of Performance for Stationary Spark Ignition Internal Combustion Engines (RICE) – 40 CFR 60 Subpart JJJJ;
- National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines (RICE) – 40 CFR 63 Subpart ZZZZ;
- National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters (Major Boiler MACT) - 40 CFR 63 Subpart DDDDD;
- National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters (Area Boiler MACT) - 40 CFR 63 Subpart JJJJJJ;
- "Once In Always In" policy issued by USEPA (Memorandum: Potential to Emit for MACT Standards – Guidance on Timing Issues, John S. Seitz, USEPA OAQPS, May 16, 1995)

Climate change regulation threatens to greatly amplify the burdens faced by U.S. manufacturers, particularly for energy-intensive industries such as the EAF steel sector. We support the Administration's effort to rescind current EPA rules addressing greenhouse gas emissions from the existing fleet of electric utilities, which, if left to take effect, promises significant increases in electricity costs (one of the primary costs facing EAF steel mills) and potential reliability issues.

In addition, SMA and SSINA remain opposed to EPA's continued development of a rule that would replace existing common sense and effective mercury source control requirements with numeric emission limits and expensive monitoring, despite no legal mandate to do so. For specialty steel, this effort is particularly troubling because EPA data confirm that mercury emissions are truly miniscule – less than one-tenth of a pound per year at representative mills.

• Clean Water Act ("CWA") Regulations – CWA regulations likely constitute the second largest environmental compliance cost for EAF steel mills. Steel mills require permits to directly discharge into jurisdictional waters, and based on the limits in their permit, must often construct and operate water treatment facilities that treat water for reuse and/or discharge. These discharge permits often require advance approvals, proscriptive operation and maintenance requirements, and significant monitoring, recordkeeping, and reporting requirements. Steel mills are also required to have permits to indirectly discharge into publicly owned treatment works ("POTW"), which treat the water before discharging to jurisdictional waters. These permits also include significant testing and reporting requirements.

CWA permitting is made exponentially more difficult if the facility is in an area subject to Total Maximum Daily Load ("TMDL") requirements. The TMDL process for establishing discharge allocations for individual facilities is extremely complex, subject to political manipulation (e.g., pitting industrial, agricultural, and other interests against one another for limited discharge allocations), and an impediment to the construction or modification of operations.

Importantly, EPA imposes permit and control requirements, not just for point source discharges (like process or cooling water), but also for nonpoint discharges such as stormwater runoff. These permits can require work practice and engineering controls designed to reduce the likelihood that surface runoff will pick up pollutants on-site before flowing off the property.

Steel mills also must develop and routinely update a facility-wide plan for protecting against, and responding to, spills of oil and oil-containing products. While it makes sense for facilities to plan for the possibilities of oil spills, EPA has interpreted the CWA to require unnecessarily detailed capture and containment planning specific to each oil container, storage area, and piece of equipment. EPA's interpretation also effectively

mandates costly control obligations like diversionary structures and retention systems – even when there is no reasonable prospect of spills (and if they have not occurred at all, as often is the case) from reaching groundwater.

CWA regulations are even more onerous when a steel company is attempting to construct or modify a facility, particularly when wetlands are present. As mentioned throughout these comments, the USACE permitting processes are slow, antiquated and expensive. These processes and regulatory burdens only will increase and expand if the 2015 "Water of the United States" rule is allowed to remain in place.⁷

• Regulation of Waste – EPA regulates solid and hazardous waste under RCRA. While the Steel Associations recognize the need to regulate the management of hazardous waste, EPA has used RCRA to expand its jurisdiction beyond hazardous waste and has done so in a way that fails to further, and may even impede, environmental protections.

The Steel Association members recycle a tremendous amount of scrap metal in their EAFs, and they produce multiple co-products that are also often reclaimed and recycled. EPA, however, treats many of these products as hazardous wastes and imposes on steel mills complex management requirements in order to avoid the full spectrum of hazardous waste regulations. In doing so, EPA fails to recognize and incentivize the important role EAF steel mills play in the recycling industry. By recycling scrap metal, the Steel Associations' members take pressure off landfills, reduce the need to mine virgin ores, and create a market incentive to clean up and mange improperly disposed scrap metal.

• Chemical/Release Reporting – Steel mills are subject to a wide variety of reporting requirements. Two of the most onerous reporting obligations, with minimal environmental benefit, are the annual EPCRA Toxic Release Inventory ("TRI") report and the quadrennial TSCA Chemical Data Reporting ("CDR") program. While TRI information may be useful in some ways to EPA and the public, the vast majority of this information – and certainly any data related to actual environmental impacts – already is available from a variety of other sources, including biennial Hazardous Waste reports, annual EPCRA chemical inventory ("Tier 2") reports, annual GHG emission reports, annual air emission reports, and monthly CWA NPDES discharge monitoring reports.

The TSCA CDR program requires steel mills to report the on-site production and downstream processing and use (industrial and consumer) of "steel" and co-/by-products of the steelmaking process such as slag and furnace dust. The utility of such information is questionable at best, and readily available from other resources regarding production and use, or, in the case of furnace dust, from RCRA waste reporting. In particular, the requirement to provide information on all downstream users of "steel" is particularly burdensome and unnecessary. While CDR reporting may provide useful information for organic chemicals, it is difficult to see the purpose of the reporting requirement for steel.

⁷ 80 Fed. Reg. 37,054 (June 29, 2015).

2. How could regulatory compliance be simplified within your industry or sector?

Environmental regulatory compliance in the EAF steel industry is exceptionally complex. Given this complexity, simplifying environmental compliance would require multiple changes across numerous regulations. As such, the Steel Associations believe that it may be appropriate to discuss this topic in more detail after additional dialogue with our members. Nonetheless, based on the initial responses of our members, the Steel Associations herein provide several interim suggestions.

- Eliminate TSCA CDR and EPCRA TRI reporting See response in Sec. II.b.1. above.
- Reconsider the 2015 Ozone Standard or take steps to improve its implementation The promulgation of the 2015 ozone NAAQS makes long term business decisions more uncertain in areas of the country affected by non-attainment with the standard. The delineation of non-attainment areas does not account for international transport of pollutants including emissions from foreign competitors. This failure to consider foreign contribution to local nonattainment in the U.S. effectively mandates over-control of domestic industries to account for the excess emissions of our poorly-controlled foreign competitors.
- Constrain EPA's use of CAA Section 114 ICRs Section 114 of the CAA allows EPA to request many types of data from permitted facilities like steel mills. While the Steel Associations do not object to the CAA's conferral of this authority, we are increasingly concerned with EPA's use of this authority. Based on our members' experience, EPA is increasingly using Section 114 ICRs that are largely focused on issues that are trivial or which do not exist at all. In many cases, the Agency appears to be fishing for potential evidence of noncompliance at facilities that are complying with all applicable permitting limits and reporting requirements. These requests are very costly to respond to in terms of time and resources. The Steel Associations believe EPA should take a more constrained approach to its Section 114 authority and provide some justification for making the request. When an ICR is deemed warranted, EPA should reasonably limit the temporal and substantive scope of the inquiry so that mills are not required to unnecessarily devote resources compiling information that is unlikely to be directly relevant to compliance.
- <u>"Sue and Settle"</u> In recent years, legal settlements with nongovernmental organizations have resulted in substantial new rulemaking and regulatory requirements applicable to steel mills and other industries. Notwithstanding the direct implications on the permittees, often the settlement discussions and agreements occur behind closed doors without any notice to the regulated entities or opportunities for those entities to comment. The Steel Associations believe that EPA (and other agencies) should be more transparent in its legal settlements and require the presence and participation of all potentially impacted industries in discussions regarding regulatory changes and rulemaking schedules.

III. Conclusion

SMA and SSINA appreciate the opportunity to provide input in response to this important inquiry regarding the regulatory burdens facing U.S. manufacturing. We have tried to provide the Administration as comprehensive a response as possible, but, as noted throughout this letter, we hope that this response serves as the first step in a continuing dialogue. The steel industry is grateful that the Administration is interested in learning about ways to improve the efficiency and efficacy of our regulations. We are proud to be constructive stakeholders in this process. If you have any questions, please feel free to contact me at (202) 342-8525 or wdangelo@kelleydrye.com.

Sincerely,

Wayne J. D'Angelo

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